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No. 08-652

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, et al.
Petitioners

v.

MUMIA ABU-JAMAL,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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Capital case: Questions presented

In 1995 the state court faced a *Mills v. Maryland* claim on collateral review. In denying the claim it expressly relied on *Zettlemoyer v. Fulcomer*, in which the Third Circuit held that the Pennsylvania instructions and verdict form did not violate *Mills*. It also relied on many similar rulings by other circuits. But by the time the claim was on federal habeas review the Third Circuit had changed its mind. In *Banks v. Horn* the circuit court applied a rule not clearly stated in *Mills*, and held that to uphold the Pennsylvania instructions and verdict form (as the circuit court itself had previously done) is not merely *incorrect*, but *unreasonable*.

1. Can a state court's failure to anticipate a rule not clearly stated by this Court but derived from *Mills* by a federal circuit court be an unreasonable application of "clearly established" federal law?

2. Can a state court ruling amount to an "unreasonable" application of federal law where the state court decision conforms to consistent decisions of federal appellate courts over the course of a decade?

[These questions were presented but left undecided in *Beard v. Banks*, 542 U.S. 406 (2004)]

List of parties

Petitioners

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Orders and Opinions below

The March 27, 2008 judgment and opinion of the United States Court of Appeals for the Third Circuit, affirming the order of the district court, is reported at *Abu-Jamal v. Horn, et.al.*, 520 F.3d 272 (3d Cir. 2008), and is reprinted in the Appendix at App. 3-125. The July 22, 2008 order of the Third Circuit denying respondent's petition for rehearing and rehearing en banc is reprinted in the Appendix at App. 1-2. The December 18, 2001 order of the district court conditionally granting the petition for writ of habeas corpus is reprinted in relevant part in the Appendix at App. 126-170. The October 29, 1998 decision of the Supreme Court of Pennsylvania is reprinted in relevant part in the Appendix at App. 171-174. The September 15, 1995 PCRA decision of the Philadelphia Court of Common Pleas is reprinted in relevant part in the Appendix at App. 175-177. The July 2, 1982 sentencing jury instructions and sentencing verdict form are reprinted in relevant part in the Appendix at App. 178-190.

Jurisdiction

This is a federal habeas corpus proceeding. Petitioner seeks review of the order of the United States Court of Appeals of the Third Circuit dated March 27, 2008, affirming the order of the district court granting the writ as to sentencing. The court denied en banc rehearing on July 22, 2008. This

Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

Constitutional and statutory provisions involved

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 2254(d) provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; ...

42 Pa.C.S. § 9711 states, in pertinent part:

(c) INSTRUCTIONS TO JURY.--

(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

(i) the aggravating circumstances specified in subsection (d) as to which there is some evidence.

(ii) the mitigating circumstances specified in subsection (e) as to which there is some evidence.

(iii) aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

(iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

Statement of the case

The Third Circuit affirmed habeas relief under *Mills v. Maryland*, granting a new sentencing hearing to the killer of a police officer two decades after his conviction. But the reasonableness of the state ruling was obvious. It expressly relied on a decision of the Third Circuit itself, and mirrored decisions of many other federal appellate courts over the course of a decade. The state court also could not have unreasonably applied "clearly established" federal law by failing to anticipate the Third Circuit's extension of *Mills* after that court had changed its mind and declined to adhere to its own prior decision.

These AEDPA deference issues were left unresolved by *Beard v. Banks*, 542 U.S. 406 (2004), but they continue to arise in Pennsylvania capital habeas cases, and the proper level of deference due such claims continues to be disputed.

Shortly before 3:38 a.m. near the corner of 13th and Locust Streets in Philadelphia, Officer Daniel Faulkner stopped a Volkswagen driven by one William Cook. The officer, who was in uniform and drove a marked police car, sent a radio call for the assistance of a police van. As he stood behind Cook and was apparently about to frisk him, Cook turned and punched him in the face. Officer Faulkner attempted to subdue and handcuff Cook. As he did so, respondent Mumia Abu-Jamal, a/k/a Wesley Cook

– William Cook's brother – emerged from a parking lot on the opposite side of the street. He ran up behind the officer and shot him in the back. The officer turned and managed to fire one shot that hit respondent in the upper chest. Officer Faulkner fell to one knee, and then fell to the ground and lay face-up. Respondent stood over him and methodically emptied his revolver at the officer's upturned face. One of his bullets struck the officer between the eyes and entered his brain (N.T. 6/19/82, 106, 209-216, 276-277; 6/21/82, 4.79-4.106, 5.179; 6/23/82, 6.97; 6/25/82, 8.4-8.34, 8.181; 6/28/82, 28.65).

Having been shot in turn by his victim, respondent sat on the curb and was still there when backup officers arrived moments later. He tried to pick up his gun and use it against them but was disarmed by one of the officers who kicked the weapon out of reach (N.T. 6/19/82, 116-117). The police transported respondent to Jefferson University Hospital, where he twice loudly announced, "I shot the mother f__ker and I hope the mother f__ker dies" (N.T. 6/19/82, 176-199, 263-264; 6/21/82, 4.109, 4.194-4.199; 6/24/82, 27-30, 33-34, 56-61, 67-68, 74, 112-116, 123, 126, 133-136). Shortly thereafter, Officer Faulkner, who had been brought to the same hospital, was pronounced dead.

On July 1, 1982, following seventeen days of testimony, a jury convicted respondent of murder of the first degree and possession of an instrument of crime (Nos. 1357-1358, January Term 1982).

In the penalty phase the jury was instructed to impose death only if it was unanimous in *rejecting* mitigation: "Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances." Otherwise the jurors were told they must weigh "any" mitigation: "Or, if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment" (N.T. 7/3/82, 92).[1]

The jurors were also provided with a verdict form stating "We, the jury, having heretofore determined that the above-named defendant is guilty of murder of the first degree, do hereby further find that ...," followed by each of the three options described above. Lines for recording any aggravating and mitigating circumstances were provided, followed by a complete list of all statutory aggravating and mitigating circumstances. Next to each listed aggravating and mitigating circumstance was a space for a check mark, and at the end of the form were

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[1] As in all contemporary Pennsylvania cases, these instructions closely followed 42 Pa.C.S. § 9711(c)(iv): "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases."

lines for the signatures of the jurors and the date. The form itself included no instructions. With respect to recording aggravating and mitigating circumstances, the court told the jurors to "put an 'X' mark or check mark" next to "whichever ones you find" (*Id.*, 94-95). The jurors were not instructed that unanimity was required to find a mitigating circumstance, or that failure of all twelve to agree on any particular circumstance barred consideration of mitigating evidence by individual jurors voting on the ultimate question of death versus life imprisonment.

On July 3, 1982, the jury returned a verdict of death, finding that one or more aggravating circumstances outweighed any mitigating circumstances. The jurors identified the aggravating circumstance as murdering a peace officer acting in the performance of his duties, and identified as a mitigating circumstance that respondent had no significant history of criminal convictions.

Post-trial motions were litigated through May 1983. On direct appeal the state supreme court affirmed the judgments on March 6, 1989. Respondent filed a petition for certiorari on May 2, 1990, which this Court denied on October 1, 1990. He filed a petition for rehearing on October 29, 1990, which was denied on November 26, 1990. Six months later, on May 15, 1991, he filed a second request for rehearing, which was denied on June 10, 1991.

On June 5, 1995, Respondent filed a petition

for state collateral review under Pennsylvania's Post Conviction Relief Act (PCRA), in which he raised *Mills* for the first time. Evidentiary hearings on his collateral review claims lasted from June 26, 1995, through September 1, 1995, with a supplemental evidentiary proceeding on September 11-12, 1995. On September 15, 1995, the court denied the petition. With respect to respondent's *Mills* claim, the state court expressly relied on the Third Circuit's 1991 decision in *Zettlemoyer v. Fulcomer*, as well as similar rulings by other circuit courts.

Respondent appealed the PCRA ruling to the state supreme court. After ordering supplemental evidentiary hearings held in October 1996 and July 1997, the court affirmed on October 29, 1998, and denied reconsideration on November 25, 1998.

On October 15, 1999, respondent filed in the United States District Court for the Eastern District of Pennsylvania a petition for a writ of habeas corpus raising 29 issues. On December 18, 2001, nine days after the 20th anniversary of respondent's murder of Officer Faulkner, the district court granted one of his twenty-nine habeas claims, finding that the state had unreasonably applied this Court's 1988 decision in *Mills v. Maryland* and granting a new penalty hearing.

The Commonwealth appealed. In affirming, the Third Circuit acknowledged that the trial court had not instructed that jurors must unanimously

agree on mitigating circumstances, or that failure to agree on a mitigating circumstance barred consideration of mitigating evidence in the weighing stage. Rather, the circuit court concluded that the trial court "risked jury confusion about a unanimity requirement" by the "close relation" of the instructions concerning mitigation and those stating that the verdict must be unanimous.

The Commonwealth now seeks certiorari.

Reasons for granting the writ

This Court should resolve the persistent AEDPA deference issues left unfinished in *Beard v. Banks*.

In granting habeas relief under *Mills v. Maryland*, 486 U.S. 367 (1988), the federal court in this case denied deference to the state judgment. Such rulings are all too typical, because AEDPA deference is persistently misunderstood. The failure of federal courts to assimilate this standard puts numerous state criminal judgments at risk.

The deference questions raised here were present in *Beard v. Banks*, 542 U.S. 406 (2004), but the Court did not reach them, because as a threshold matter the *Mills* claim was barred by *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* does not apply here, but its goals of comity, finality, and federalism do. They are the basis for the deference

requirement of 28 U.S.C. § 2254(d). *Duncan v. Walker*, 533 U.S. 167, 178 (2001) ("AEDPA's purpose [is] to further the principles of comity, finality, and federalism").

The unresolved *Mills* deference issues live on. Habeas petitioners continue to raise *Mills* claims in Pennsylvania, relying on the Third Circuit's precedent that was not addressed in *Beard v. Banks*. *E.g.*, *Lambert v. Beard*, 2007 U.S. Dist. LEXIS 54047 (E.D. Pa. July 24, 2007); *Morris v. Beard*, 2007 U.S. Dist. LEXIS 44707 (E.D. Pa. June 20, 2007); *Williams v. Beard*, 2007 U.S. Dist. LEXIS 41310 (E.D. Pa. May 7, 2007); *Cross v. Price*, 2005 U.S. Dist. LEXIS 18510, 15-16 (W.D. Pa. Aug. 30, 2005); *Thomas v. Beard*, 388 F. Supp. 2d 489 (E.D. Pa. 2005); *Rollins v. Horn*, 2005 U.S. Dist. LEXIS 15493 (E.D. Pa. July 26, 2005).

This case should be accepted to resolve what was left unfinished in *Beard v. Banks*.

1. Because this Court has never considered the *Mills*-based rule discerned by the circuit court, the state court could not have misapplied "clearly established" federal law.

In *Mills* "this Court held invalid capital sentencing schemes that require juries to disregard mitigating factors not found unanimously." *Beard v. Banks*, 542 U.S. at 408. The *Mills* jurors were specifically told that they must unanimously agree

in order to find any mitigating circumstance, and that failure to agree on a mitigating circumstance required them to reject it. In effect, one juror could veto mitigation.

Not so in Pennsylvania: the jurors here were instructed to decide, first, if they unanimously found aggravating circumstances but no mitigating circumstances. If they found aggravating circumstances but did not unanimously agree that there were "no" mitigating circumstances, they were to weigh "any" mitigating circumstances. Since the jurors were told they must be unanimous not to *find* mitigation but to *exclude* it, and that they must otherwise weigh *any* mitigation, the instructions were the inverse of those in *Mills*.

The *Mills* error found by the federal court here does not concern what the jurors were told, but what they might have imagined -- *i.e.*, that "any mitigating circumstances" might mean "any *unanimously found* mitigating circumstances." Under the Third Circuit's view of *Mills*, relief is required if one may posit a "risk of confusion," 520 F.3d at 303 (App. 82), such that jurors hearing that unanimity applies to some aspects of the capital sentencing decision might, without being told, assume unanimity is also necessary to finding mitigating circumstances.

The difficulty with the Third Circuit's "risk of confusion" view is that *Mills*, quite simply, stated

no such rule. In both that case and *McKoy v. North Carolina*, 494 U.S. 433 (1990), it was undisputed that jurors had been *explicitly* instructed that unanimity was required to find mitigating circumstances.[2]

The Third Circuit's "risk of confusion" standard is not a restatement of the *Mills* Court's holding that jurors may not be instructed that unanimity is required to find mitigation. It is instead a gloss, derived from the *Mills* Court's discussion of Maryland's "saving construction."

In *Mills* the state conceded that the instructions erroneously required unanimity to *find* mitigation, but argued that the error was offset because the instructions could be read to require unanimity to *reject* mitigation (thus proving that no juror was prevented from giving effect to mitigating evidence because all rejected it). This Court found the proposed saving construction unpersuasive because, *on that latter point*, the instructions were ambiguous. *Mills*, 486 U.S. at 376 (if jurors

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[2] *Mills*, 486 U.S. at 378 ("it was clear that the jury could not mark "yes" in any box without unanimity"); 401 (verdict form stated "we unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven"); *McKoy*, 494 U.S. at 436 ("write 'Yes' if you unanimously find that mitigating circumstance ... [w]rite 'No' if you do not unanimously find that mitigating circumstance").

understood instructions as the state court asserted, "the court properly upheld the judgment"; but the verdict "must be set aside" if valid on only one of two grounds where court could not be certain which was adopted by the jury); 486 U.S. at 383 ("We cannot say with any degree of confidence which interpretation Mills' jury adopted"); 486 U.S. at 391 (Rhenquist, C.J., with O'Connor, Scalia, and Kennedy, J.J., dissenting) (contending that sole reasonable interpretation was that jurors "unanimously found that no mitigating factors existed") (emphasis omitted).

The ambiguity disputed in *Mills* thus concerned only the state's argument that the instructions there, which expressly required unanimity to find mitigation, might be construed to require unanimity to reject mitigation. There was no ambiguity at all in the instruction that actually created the constitutional error to begin with: the explicit instruction that jurors must unanimously agree in order to find mitigation. Because that instruction was error, the state bore the risk of ambiguity or confusion *in its saving construction*.[3]

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[3] Likewise in *McKoy*, there was no dispute that jurors had been clearly told they must be unanimous in order to find mitigation; the controversy there concerned whether the state was entitled to define as "irrelevant" mitigating circumstances not found unanimously. 494 U.S. at 438-439.

Neither in *Mills*, nor in any other case, however, has this Court ever held that a *Mills* error consists of a "risk of confusion" arising from instructions that do *not* require unanimity to find mitigation.

Indeed, such a gloss conflicts with *Boyde v. California*, 494 U.S. 370 (1990). There, this Court set out to correct improper formulations of the standard for evaluating jury instructions, several of which had appeared in *Mills* itself. *Boyde* clarified that a valid challenge to jury instructions requires a "substantial possibility" that the jury's verdict rested on a constitutionally improper ground. The principle that relief is due when a jury "is clearly instructed that it may [act on] an impermissible legal theory, as well as on a proper theory or theories," does *not* apply to instructions containing *no clear error*. 494 U.S. at 380 (relief unwarranted where instruction "is not concededly erroneous," but rather is claimed to be "ambiguous and therefore subject to an erroneous interpretation"). To hold otherwise would undermine the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Id.*

The Third Circuit's "risk of confusion" rule depends on such speculation. For the error in *Mills* – an instruction requiring unanimity to find mitigation – it substitutes an "impression" of a unanimity requirement, supposedly derived from

reference to unanimity "in close relation to ... discussion of mitigating circumstances." 520 F.3d at 303 (App. 81). But the error in *Mills* had nothing to do with the proximity of the words "unanimous" and "mitigation," and *Boyde* precludes relief where the instruction is not erroneous but merely "subject to an erroneous interpretation."

Indeed, under the Third Circuit's rule that a *Mills* error can arise from mere word proximity, error can be avoided only with an affirmative "anti-*Mills*" instruction. Because there is no way to know if the trigger words are too close or far enough apart, the circuit court's rule, in effect, requires jurors to be explicitly told that unanimity is *not* required to find mitigation. There is no other way to avoid the "risk of confusion."

Whatever else might be true of the Third Circuit's gloss, it was not clearly established by *Mills* or by any other decision of this Court. This is an AEDPA case. The writ may not issue unless the state decision unreasonably applied this Court's "clearly established" precedent. A rule that this Court has never stated cannot be "clearly established." *Wright v. Van Patten*, 128 S. Ct. 743, 747 (2008) ("Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, it cannot be said that the state court unreasonably applied clearly established Federal law") (quotation marks, citation and brackets omitted); *Schriro v. Landrigan*, 127 S. Ct. 1933,

1942 (2007) (because Supreme Court had "never addressed a situation like this," state court decision was not unreasonable at the time it was made); *Carey v. Musladin*, 127 S. Ct. 649, 653-654 (2006) (where claim raised "an open question" that Supreme Court "has never addressed," circuit court erred in ruling that state court had unreasonably applied clearly established federal law).

Directly on point is *Hudson v. Spisak*, 128 S. Ct. 373 (2007). In that case the circuit court had applied *Mills* despite the absence of a mitigation unanimity instruction. As here, it reasoned that a mitigation unanimity requirement was *implied* because the trial court told jurors they must unanimously decide whether aggravating factors outweighed mitigating factors, and "failed to instruct the jury that it need not be unanimous in rejecting the death penalty." *Spisak v. Mitchell*, 465 F.3d 684, 710 (6th Cir. 2006) (citation and internal quotation mark omitted).

In its certiorari petition in *Spisak* the state of Ohio noted that the circuit court had applied a rule not found in *Mills* by "requiring affirmative explanation ... of the jury's freedom to disagree about mitigating factors" (Ohio's petition for writ of certiorari, 20). This Court granted certiorari, vacated the circuit court's decision, and remanded for further consideration in light of *Carey v. Musladin* and *Schriro v. Landrigan*.

Certiorari is equally called for here. As in *Spisak*, the Third Circuit applied a rule – its own "risk of confusion" rule that effectively requires a non-unanimity instruction – that is not found in *Mills*.

Because the Pennsylvania supreme court could not have misapplied "clearly established" law that this Court never established, *Spisak* calls for certiorari to be granted.[4]

2. The Pennsylvania supreme court's *Mills* ruling conforms to consistent federal appellate decisions over the course of a decade, and could not have been unreasonable.

The Third Circuit's "risk of confusion" rule is not clearly established by *Mills*. Indeed, it conflicts with *Boyde*, which indicates that the state court's judgment here was correct. But *it did not need to be*. The question is not whether the state court's decision was *incorrect*. The question is whether it

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[4] When *Spisak* was remanded for further consideration, moreover, the Sixth Circuit persisted in its failure to abide by the "clearly established" requirement of § 2254. *Spisak v. Hudson*, 512 F.3d 852 (6th Cir. 2008). The state of Ohio is therefore expected to file another petition for certiorari, shortly after the filing of the Commonwealth's petition in this case, raising the same deference issue.

was *unreasonable*. *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (per curiam).

The resolution of that question is simple. The state court's ruling cannot be unreasonable, because federal appellate decisions over the course of a decade *have consistently reached the same result*. These decisions reasonably conclude, as does the Pennsylvania Supreme Court, that *Mills* is not violated where there is no explicit unanimity requirement to find mitigation:

* In *Abdur'rahman v. Bell*, 226 F.3d 696, 712 (6th Cir. 2000), *cert. denied*, 534 U.S. 970 (2001), the court rejected a claim that *Mills* required relief because the proximity of the terms "unanimous" and "mitigating circumstances" implied that mitigating circumstances must be found unanimously.

* *Smith v. Dixon*, 14 F.3d 956, 982 n.15 (4th Cir.) (*en banc*), *cert. denied*, 513 U.S. 841 (1994), held that there was no *Mills* error where the jury was required to write "Yes" on the verdict form beside each mitigating circumstance "for which the defendant has satisfied you," and the instructions required unanimity as to aggravating circumstances and the outcome of the weighing stage.

* Nine of thirteen judges on the en banc panel in *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120 (6th

Cir. 1990) (*en banc*), *cert. denied*, 499 U.S. 970 (1991), concluded that, while the jurors there were told that unanimity was necessary to find an aggravating circumstance, "it cannot be reasonably inferred that silence as to finding a mitigating factor would likely cause the jury to assume that unanimity was also a requirement."[5]

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[5] *Accord Henley v. Bell*, 487 F.3d 379, 391 (6th Cir. 2007) ("the plain language of both the instructions and the verdict form require unanimity as to the weighing of aggravating and mitigating circumstances -- not the existence of a mitigating circumstance"); *Scott v. Mitchell*, 209 F.3d 854, 874 (6th Cir.), *cert. denied*, 531 U.S. 1021 (2000) (no *Mills* issue where jurors told "all 12 of you must sign [the verdict form] ... [i]t must be unanimous"); *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999) ("[a] trial court need not ... expressly instruct a capital sentencing jury that unanimity is not required before each juror can consider a particular mitigating circumstance"); *Duvall v. Reynolds*, 139 F.3d 768, 791 (10th Cir.), *cert. denied*, 525 U.S.933 (1998) (same); *Arnold v. Evatt*, 113 F.3d 1352, 1363 (4th Cir. 1997), *cert. denied*, 522 U.S. 1058 (1998) ("Arnold now claims a "substantial possibility" existed that the jury could have thought it must also unanimously agree as to the existence of any mitigating circumstances. Unlike in *McKoy* or *Mills*, however, the jury instructions never required the jury to find any mitigating factor unanimously"); *Parker v. Norris*, 64 F.3d 1178, 1187 (8th Cir. 1995), *cert. denied*, 516 U.S. 1095 (1996) (that verdict form "failed to inform jurors that they could consider non-unanimous mitigating circumstances" did not violate *Mills*); *Griffin v. Delo* 33 F.3d 895, 905-906 (8th Cir. 1994), *cert. denied*, 514 U.S. 1119 (1995) (instruction that jurors must impose life if they unanimously found that

(continued...)

Tellingly, *this list includes the Third Circuit itself.* In 1991 – four years before respondent raised his *Mills* claim in state court – the Third Circuit followed suit in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir.), *cert. denied*, 502 U.S. 902 (1991). There, the circuit court reviewed instructions virtually identical to those here, and concluded that they did not violate *Mills*. 923 F.2d at 308 ("Neither the court nor the verdict sheet stated that the jury must unanimously find the existence of particular mitigating circumstances ... *Mills* is clearly distinguishable").[6]

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[5](...continued)
any mitigating circumstances outweighed aggravating circumstances did not imply that they must be unanimous to find mitigating circumstances); *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993), *cert. denied*, 471 U.S. 1120 (1994) (*Mills* not violated where jurors told to "find unanimously" whether aggravating circumstances outweigh mitigating ones; "such an instruction does not run afoul of *Mills/McKoy* because it does not state that jurors must agree unanimously on the existence of a mitigating factor") (citation and internal quotation marks omitted).

[6] The instructions in *Zettlemoyer* stated: "If you find [the sole proffered] aggravating circumstance and find no mitigating circumstances or if you find that the aggravating circumstance which I mentioned to you outweighs any mitigating circumstance you find, your verdict must be the death penalty."

When respondent first raised a *Mills* claim in his 1995 PCRA petition, the state court denied it, expressly citing and relying on *Zettlemoyer*. *Commonwealth v. Abu-Jamal*, 30 Phila. 1, 110 (1995) ("The constitutionality of similar verdict forms, along with the instructions given here, has repeatedly been upheld"; citing *Zettlemoyer* and similar cases from other circuit courts) (App. 176).

Two years after the state PCRA court relied on *Zettlemoyer*, however, the Third Circuit changed its mind.[7]

In *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir.1997), *cert. denied*, 524 U.S. 911 (1998), the circuit court reached exactly the opposite result. It purported to distinguish *Zettlemoyer* by noting that in *Frey* there were fewer words between the trial court's use of the words "unanimous" and "mitigating." While those terms were seventeen words apart in *Zettlemoyer*, the court explained, they were only seven words apart in *Frey*, and created a "sound bite" that could confuse jurors into thinking that "unanimous" modified "mitigating." 132 F.3d at 923.

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[7] Although this deference question was not decided in *Beard v. Banks*, the change of mind was noted in a question from the Court at oral argument (Transcript of oral argument, *Beard v. Banks*, 11 ["... the court of appeals has changed its mind in this area, has it not?"]).

This distinction was clearly specious. Whether the words in *Zettlemoyer* or *Frey* were close or far apart, it was undisputed that they never said that the jurors must be unanimous to find mitigating circumstances.[8]

The circuit court faced a virtually identical *Mills* claim in *Banks v.Horn*, 271 F.3d 527 (3d Cir. 2001), *reversed on other grounds sub. nom. Beard v. Banks*, 542 U.S. 406 (2004).[9] *Banks*, unlike *Frey*, was governed by the new AEDPA provisions. Yet, despite the conflict with *Zettlemoyer*, in which the circuit court *itself* had ruled identically with the state court, in *Banks* the circuit court declared the state court's ruling an unreasonable application of *Mills*.

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[8] The instructions in *Frey* stated: "You are obliged by your oath of office to fix the penalty at death if you unanimously agree and find beyond a reasonable doubt that there is an aggravating circumstances [sic] and either no mitigating circumstance or that the aggravating circumstance outweighs any mitigating circumstances."

[9] The instructions in *Banks* stated: "The Crimes Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances."

To reach that result the *Banks* court compared the trial court's instructions "with those we found in *Frey* to be constitutionally defective," and concluded that the "same concerns" discussed in *Frey* "dictate the same result here." 271 F.3d at 544, 546-548. But *Frey* was a non-deference case. Thus, while the court in *Banks* was ostensibly bound by the new, highly deferential § 2254 standard, it admitted that it actually followed its prior decision in *Frey* – a case in which there was no such deference.[10]

The situation continues to the present day. In this case the district court considered itself obliged to follow *Banks*. On appeal the Third Circuit also followed *Banks*, notwithstanding *Zettlemoyer*. It did so even though *Banks* had been reversed on *Teague* grounds in 2004, because the validity of the Third Circuit's resolution of the *Mills* claim under § 2254 was not reached by this Court.

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[10] The *Banks* court stated that it was entitled to rely on its "independent judgment in its interpretation of federal law." 271 F.3d at 542 n.15. In concluding that "independent judgment" equals deference, the *Banks* court cited part II of the opinion of Justice Stevens in *Williams v. Taylor*, 529 U.S. 362 (2000). But a majority of this Court joined only parts I, III, and IV of that opinion. As was made clear in 2002 in *Woodford v. Viscotti, supra*, this Court has rejected the view that a federal court's "independent judgment" controls under § 2254. 537 U.S. at 24 (federal court erred when it "substituted its own judgment for that of the state court").

Thus here, once again citing *Banks*, the Third Circuit found that the state court's decision that expressly relied on a controlling decision of the Third Circuit itself was *unreasonable*. The circuit court brushed aside the conflict with *Zettlemoyer* and its bearing on the reasonableness issue, vaguely acknowledging that there is "tension" between its own decisions. 520 F.3d at 304 (App. 83).

Had the Third Circuit reviewed the state court's judgment in 1991, when it decided *Zettlemoyer*, it would necessarily have found the state decision not merely *reasonable*, but *correct*. Did that same state decision somehow become not merely *incorrect*, but *unreasonable*, simply because the circuit court later changed its mind?

The Third Circuit has never addressed the conflict between its "risk of confusion" gloss on *Mills*, and the contrary view of numerous federal decisions that *Mills* is inapplicable unless jurors are in fact told to be unanimous to find mitigation. Nor has it ever addressed the conflict between its own decisions and *Zettlemoyer*, on which the state court had expressly relied in 1995, and which had previously agreed with the rulings of other circuits before the change of mind.

Thus, the circuit court has never really addressed whether the contrary view of the Supreme Court of Pennsylvania is *reasonable*. And

how could it not be? To conclude otherwise would irrationally deem *un*reasonable the persistently contrary decisions of other federal appellate courts over the course of a decade, to say nothing of the Third Circuit's own decision in *Zettlemoyer*.[11]

These issues show no sign of abating. They continue to be asserted in Pennsylvania federal habeas petitions.

This Court's intervention is needed to finally settle the unfinished business of *Banks*. Because the state court's judgment could not possibly have been an *unreasonable* application of clearly established federal law, and because the Third Circuit's decision conflicts with those of other circuits as well as its own precedent, certiorari should be granted.

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[11] Indeed, when the state of Ohio first petitioned for certiorari in the *Spisak* case, it argued that the Sixth Circuit decision conflicted with those of other circuits, citing the Third Circuit's decision in *Zettlemoyer* (Ohio petition for certiorari at No. 06-1535, p. 22). The split here is not merely between circuits, but both between other circuits and *within* the deciding circuit.

Conclusion

For the reasons stet forth above, the Commonwealth respectfully requests this Court to grant its petition for writ of certiorari.

Respectfully submitted:

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-9014 & 02-9001

MUMIA ABU-JAMAL,
a/k/a WESLEY COOK

Mumia Abu-Jamal,
Appellant at No. 02-9001

v.

MARTIN HORN, PENNSYLVANIA DIRECTOR OF CORRECTIONS; CONNER BLAINE, SUPERINTENDENT, SCI GREENE; DISTRICT ATTORNEY FOR PHILADELPHIA COUNTY; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Appellants at No. 01-9014

(D.C. Civ. No. 99-cv-5089)

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*,
SLOVITER, BARRY, AMBRO, FUENTES,

SMITH, CHAGARES, JORDAN, HARDIMAN and COWEN*, *Circuit Judges.*

The petition for rehearing filed by appellee/cross-appellant Mumia Abu-Jamal in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied. Judge Ambro would grant rehearing en banc.

BY THE COURT,

/s/ Anthony J. Scirica
Chief Judge

Dated: July 22, 2008
CMD/cc: Robert R. Bryan, Esq.
Judith L. Ritter, Esq.
Hugh J. Burns, Jr., Esq.
Ronald Eisenberg, Esq.
Christina Swarns, Esq.
Jill Elijah, Esq.

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*As to panel rehearing only.

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
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Nos. 01-9014 & 02-9001

MUMIA ABU-JAMAL,
a/k/a WESLEY COOK

Mumia Abu-Jamal,
Appellant at No. 02-9001

v.

MARTIN HORN, PENNSYLVANIA DIRECTOR OF CORRECTIONS; CONNER BLAINE, SUPERINTENDENT, SCI GREENE; DISTRICT ATTORNEY FOR PHILADELPHIA COUNTY; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Appellants at No. 01-9014

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Action No. 99-cv-5089
(Honorable William H. Yohn Jr.)

App. 4

Argued May 17, 2007
Before: SCIRICA, *Chief Judge*,
AMBRO and COWEN, *Circuit Judges*.

(Filed March 27, 2008)

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OPINION OF THE COURT

SCIRICA, *Chief Judge*.

This petition for collateral review under 28 U.S.C. § 2254 came to us more than two decades after trial. In 1982, Mumia Abu-Jamal was

convicted and sentenced to death in a Pennsylvania court for the murder of Philadelphia Police Officer Daniel Faulkner. Following denial of his appeals in state court, Abu-Jamal filed a petition for a writ of habeas corpus in federal district court. The District Court vacated his death sentence and granted a new penalty hearing, but denied all other relief, affirming the judgment of conviction. The Commonwealth of Pennsylvania appealed the order vacating the death penalty. Abu-Jamal appealed his conviction.

We consider four issues on appeal: (1) whether the Commonwealth's use of peremptory challenges violated Abu-Jamal's constitutional rights under *Batson v. Kentucky*, 476 U.S. 79 (1986); (2) whether the prosecution's trial summation denied Abu-Jamal due process; (3) whether Abu-Jamal was denied due process during post-conviction proceedings as a result of judicial bias; and (4) whether the jury charge and sentencing verdict sheet violated Abu-Jamal's constitutional rights under *Mills v. Maryland*, 486 U.S. 367 (1988), and *Boyde v. California*, 494 U.S. 370 (1990). We will affirm the judgment of the District Court.

I.

On December 9, 1981, between three thirty and four o'clock in the morning, Philadelphia Police Officer Daniel Faulkner made a traffic stop of a Volkswagen driven by William Cook, Abu-Jamal's

brother, on Locust Street between 12th and 13th Streets, in Philadelphia. Officer Faulkner radioed for back-up assistance, and both men exited their vehicles. A struggle ensued, and Officer Faulkner tried to secure Cook's hands behind his back. At that moment, Abu-Jamal, who was in a parking lot on the opposite side of the street, ran toward Officer Faulkner and Cook. As he approached, Abu-Jamal shot Officer Faulkner in the back. As Officer Faulkner fell to the ground, he was able to turn around, reach for his own firearm, and fire at Abu-Jamal, striking him in the chest. Abu-Jamal, now standing over Officer Faulkner, fired four shots at close range. One shot struck Officer Faulkner between the eyes and entered his brain.

Within a minute of Officer Faulkner's radio call, Officers Robert Shoemaker and James Forbes responded. Robert Chobert, a taxi cab driver who had just let out a passenger at 13th and Locust, stopped the officers before they arrived at the scene and notified them an officer had just been shot. Officer Shoemaker then approached the parked Volkswagen on foot and observed Abu-Jamal sitting on the curb. Despite Officer Shoemaker's repeated orders to freeze, Abu-Jamal did not remain still and reached for an object Officer Shoemaker could not yet identify. As Officer Shoemaker inched closer, he saw a revolver on the ground close to Abu-Jamal's hand. Officer Shoemaker kicked Abu-Jamal in the chest to move him away from the gun, and then kicked the gun out of

Abu-Jamal's reach. Officer Shoemaker then motioned for Officer Forbes to watch Abu-Jamal while Shoemaker attended to Officer Faulkner. During this time, Officer Forbes also searched Cook, who had remained at the scene and was standing near the wall of an adjacent building. Cook made only a single statement: "I had nothing to do with it."

Additional officers arrived on the scene. Officer Faulkner was immediately rushed to Thomas Jefferson University Hospital, where he was later pronounced dead. Officers took Abu-Jamal into custody. He resisted arrest while officers moved him to a police van and tried to handcuff him. Abu-Jamal was also taken to Thomas Jefferson University Hospital. While Abu-Jamal was waiting for treatment in the emergency room's lobby, Priscilla Durham, a security guard on duty at the hospital, heard Abu-Jamal twice repeat, "I shot the motherfucker, and I hope the motherfucker dies." Officer Gary Bell also heard Abu-Jamal make this statement. Hospital personnel then took Abu-Jamal into the emergency room for treatment.

Officer Forbes recovered two weapons from the scene. A standard police-issue Smith & Wesson .38 caliber Police Special revolver, registered and issued to Officer Faulkner, with one spent Remington .38 special cartridge, was found on the street about five feet away from Officer Faulkner. Ballistic testing later confirmed the bullet that struck

Abu-Jamal was fired from Officer Faulkner's revolver. A Charter Arms .38 caliber revolver containing five "Plus-P" high-velocity spent cartridges was found on the sidewalk near Abu-Jamal. Abu-Jamal had purchased this revolver in June 1979 and it was registered in his name. Officer Anthony Paul, supervisor of the Firearms Identification Unit in the Laboratory Division of the Philadelphia Police Department, testified at trial that the bullet recovered from Officer Faulkner's head was badly mutilated and could not be matched with a specific firearm. Officer Paul also testified that the recovered bullet specimen had eight lands and grooves with a right hand direction of twist, which was consistent with a bullet fired from a Charter Arms revolver.

The Commonwealth presented four eye-witnesses at trial. Cynthia White testified she saw Abu-Jamal run out of a parking lot on Locust Street as Officer Faulkner attempted to subdue Cook, and saw Abu-Jamal shoot Officer Faulkner in the back. She testified she then watched Officer Faulkner stumble and fall, and then saw Abu-Jamal hover over Officer Faulkner, shoot him a few more times at a close distance, and then sit down on the curb. Robert Chobert testified he heard a shot, looked up, saw Officer Faulkner fall to the ground, and then saw Abu-Jamal fire a few shots into Officer Faulkner. At the scene, Chobert identified Abu-Jamal as the person who shot Officer Faulkner. Michael Scanlon testified he witnessed

an assailant, whom he could not identify, shoot Officer Faulkner from behind, then watched the officer fall, and saw the assailant stand over the officer and shoot him in the face. Albert Magliton testified he saw Abu-Jamal run across the street from the parking lot, then he heard shots and saw Officer Faulkner on the ground and Abu-Jamal on the curb. Magliton identified Abu-Jamal as the shooter, both at the scene and at trial.

On December 15, 1981, Anthony Jackson was appointed counsel for Abu-Jamal. Abu-Jamal was arraigned on charges of first degree murder and other related charges. The court granted Abu-Jamal's request to proceed *pro se* and the court designated Jackson, who had spent five months preparing for trial, as back-up counsel.

A jury trial commenced on June 7, 1982. Abu-Jamal was disruptive, uncooperative, and hostile. He repeatedly insisted that John Africa, a social activist who was not a lawyer, be appointed as counsel, even after the court denied this request. Abu-Jamal's conduct necessitated his removal from proceeding *pro se* for the remainder of the trial, and at times caused him to be physically removed from the courtroom. The jury was instructed against drawing negative inferences from his removal. Jackson, who was present throughout the entire trial and was reinstated as primary counsel when Abu-Jamal was removed, kept Abu-Jamal fully informed throughout the proceedings.

During the lengthy trial, Jackson cross-examined each witness called by the prosecutor. Abu-Jamal presented seventeen witnesses: eight fact witnesses and nine character witnesses. Neither Abu-Jamal nor Cook testified at trial. On July 2, 1982, the jury found Abu-Jamal guilty of first degree murder and of possessing an instrument of a crime.

On July 3, 1982, the jury heard evidence and argument in a penalty phase hearing. Later that day, the jury returned a sentence of death. The jury found one aggravating circumstance, killing a police officer acting in the line of duty, and one mitigating circumstance, Abu-Jamal's lack of a significant criminal record. The court denied post-trial motions on May 25, 1983, and imposed a sentence of death. The court then appointed new appellate counsel for Abu-Jamal's direct appeal to the Pennsylvania Supreme Court.

This case has been heard and considered by several courts throughout a lengthy appeals process. On direct review, the Pennsylvania Supreme Court affirmed the trial court's judgment of conviction and sentence on March 6, 1989. *See Commonwealth v. Abu-Jamal*, 555 A.2d 846 (Pa. 1989). Abu-Jamal presented a *Batson v. Kentucky*, 476 U.S. 79 (1986), argument – the prosecution systematically excluded jurors by race through the use of peremptory challenges – for the first time on his direct appeal to the Pennsylvania Supreme Court.

Abu-Jamal, 555 A.2d at 849. The court denied rehearing. *See Commonwealth v. Abu-Jamal*, 569 A.2d 915 (Pa. 1990). On October 1, 1990, the United States Supreme Court denied Abu-Jamal's petition for writ of certiorari. *See Abu-Jamal v. Pennsylvania*, 498 U.S. 881 (1990). On November 26, 1990, the United States Supreme Court denied Abu-Jamal's petition for rehearing. *See Abu-Jamal v. Pennsylvania*, 498 U.S. 993 (1990). The Court denied a second request for rehearing on June 10, 1991. *See Abu-Jamal v. Pennsylvania*, 501 U.S. 1214 (1991). On June 1, 1995, Pennsylvania Governor Thomas Ridge signed Abu-Jamal's writ of execution, which was to be carried out on August 17, 1995.

Abu-Jamal's new counsel filed a Petition for Stay of Execution, a Petition for Recusal of the post-conviction court, a Petition for Discovery, and a Petition for Post Conviction Relief (PCRA) on June 5, 1995. On June 12, 1995, the Court of Common Pleas of Philadelphia County (PCRA court) denied the petition for recusal, granted the petition for an evidentiary hearing, and held the petition for stay of execution under advisement. Abu-Jamal filed an emergency appeal to the Pennsylvania Supreme Court for recusal of the PCRA court; the court affirmed the denial of recusal. The PCRA court denied the petition for discovery on June 14, 1995. The Pennsylvania Supreme Court later denied reconsideration of the petitions for recusal and discovery.

The PCRA court scheduled the evidentiary hearing to begin on July 18, 1995. The Pennsylvania Supreme Court granted Abu-Jamal's emergency application for temporary stay of the evidentiary hearing and ordered that it commence on July 26, 1995. The PCRA court conducted an evidentiary hearing, which lasted from July 26 to August 15, 1995. The PCRA court granted Abu-Jamal's motion to stay his execution on August 7, 1995. Abu-Jamal presented a *Mills v. Maryland*, 486 U.S. 367 (1988), argument – the jury instructions and verdict form employed in the sentencing phase were constitutionally defective – for the first time on collateral review before the PCRA court. *See Commonwealth v. Abu-Jamal*, No. 1357, 1995 WL 1315980, at *111 (C.P. Ct. Phila. Cty. Sept. 15, 1995) [hereinafter *PCRA Op.*]. On September 15, 1995, the PCRA court denied the petition for post-conviction relief. *See PCRA Op.*, 1995 WL 1315980 at *128.

Abu-Jamal appealed to the Pennsylvania Supreme Court. Abu-Jamal filed a motion for remand for the purpose of taking additional testimony from Veronica Jones, an allegedly newly available witness. The Pennsylvania Supreme Court ordered the matter remanded to the PCRA court for an evidentiary hearing on the claim. The PCRA court held a three-day evidentiary hearing, and on November 1, 1996, denied Abu-Jamal's motion to supplement the record with Jones's testimony on the grounds that she was neither

newly available nor credible. *See Commonwealth v. Abu-Jamal*, No. 1357 Jan. Term 1982 (C.P. Ct. Phila. Cty. Nov. 1, 1996).

Abu-Jamal then sought remand to the PCRA court to conduct additional discovery of prosecution and police files in their entirety, to supplement his *Batson* claim based upon a videotape released after his trial, to reassign the matter on remand to a different judge, and to elicit testimony from Pamela Jenkins, a witness who would allegedly support Abu-Jamal's claims of witness coercion and police intimidation. The Pennsylvania Supreme Court denied the motions to conduct additional discovery, to reassign the matter, and to supplement the *Batson* claim, but it did order remand for an evidentiary hearing to take Jenkins's testimony. The PCRA court conducted an evidentiary hearing and on July 24, 1997, denied relief on the ground that Jenkins's testimony was not credible. *See Commonwealth v. Abu-Jamal*, Nos. 1357-58 Jan. Term 1982 (C.P. Ct. Phila. Cty. July 24, 1997).

On October 29, 1998, the Pennsylvania Supreme Court unanimously affirmed the denial of post-conviction relief. *See Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998) [hereinafter *PCRA Appeal Op.*]. The court denied a petition for reconsideration and denied Abu-Jamal's motion for Justice Ronald Castille to recuse himself. On October 4, 1999, the United States Supreme Court denied a petition for writ of certiorari. *Abu-Jamal v.*

Pennsylvania, 528 U.S. 810 (1999). Governor Ridge signed a second writ of execution, which was to be carried out on December 2, 1999.

Abu-Jamal filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania on October 15, 1999, raising twenty-nine claims asserting alleged defects in both the guilt and penalty phases of his trial, and errors in post-conviction review. On October 26, 1999, the District Court granted a motion to stay the execution. After extensive briefing by both parties, on December 18, 2001, the District Court, in a 270-page typescript opinion that thoroughly explored all the claims, denied the writ of habeas corpus on all guilt-phase claims, and did not grant a new trial. But the District Court found constitutional error in the penalty-phase *Mills* claim and granted habeas corpus relief on this ground, rendering the additional penalty-phase claims moot. *See Abu-Jamal v. Horn*, No. Civ. A. 99-5089, 2001 WL 1609690, at *1 (E.D. Pa. Dec. 18, 2001). The District Court ordered the Commonwealth to conduct a new sentencing hearing or impose a life sentence. *Id.* at *130. The District Court issued a certificate of appealability as to the *Batson* claim. *Id.*

The Commonwealth timely appealed on December 20, 2001, and Abu-Jamal timely cross-appealed on January 16, 2002. Abu-Jamal petitioned for certification of additional issues for

appeal. On June 11, 2002, we stayed consideration of this appeal pending the decision of the Pennsylvania Supreme Court on appeal of Abu-Jamal's second PCRA petition. On October 8, 2003, the Pennsylvania Supreme Court affirmed the PCRA court's denial of relief. *See Commonwealth v. Abu-Jamal*, 833 A.2d 719 (Pa. 2003). On April 29, 2004, we issued a subsequent stay pending the outcome of *Beard v. Banks*, 542 U.S. 406 (2004), a relevant case pending before the United States Supreme Court. We lifted the stay on June 29, 2004, after the Court issued its opinion in *Banks*. The United States Supreme Court denied a third petition for a writ of certiorari on May 17, 2004. *See Abu-Jamal v. Pennsylvania*, 541 U.S. 1048 (2004).

On October 19, 2005, we granted the motion to expand the certificate of appealability with regard to two claims: whether Abu-Jamal was denied his constitutional rights due to the prosecution's trial summation and whether Abu-Jamal was denied due process during post-conviction proceedings as a result of alleged judicial bias. We had already agreed to hear appeals on whether the use of peremptory challenges at trial violated *Batson*, and whether the verdict form and jury charge violated *Mills*.[1]

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[1]A certificate of appealability was granted on claims 14, 16, and 29. The Commonwealth of Pennsylvania appealed the District Court's order granting the petition of

(continued...)

II.

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), a state prisoner's habeas petition must be denied as to any claim that was "adjudicated on the merits in State court proceedings" unless the adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) & (2). Under the "unreasonable application" prong of § 2254(d)(1), "the question . . . is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schriro v. Landrigan*, 127 S. Ct. 1933, 1939 (2007) (citing *Williams v. Taylor*, 529 U.S. 362, 410 (2000)). Abu-Jamal filed his petition for a writ of habeas corpus in 1999; accordingly, his claims are subject to AEDPA. *See Weeks v. Snyder*, 219 F.3d 245, 256 (3d Cir. 2000).

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[1](...continued)
habeas corpus on claim 25. A certificate of appealability is not required for the Commonwealth's appeal. Fed. R. App. P. 22(b)(3).

III.

As noted, Abu-Jamal, who is black, was convicted and sentenced for the 1981 murder of Officer Faulkner, who was white. While the matter was on direct appeal, the Supreme Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986).[2] Abu-Jamal contends the prosecutor used peremptory strikes in a racially discriminatory manner during jury selection in violation of *Batson*. To demonstrate racial discrimination in the use of peremptory challenges at the time of Abu-Jamal's trial, a defendant was required to "show a pattern and practice of racial discrimination in jury selection across multiple prosecutions," *Sistrunk v. Vaughn*, 96 F.3d 666, 668 (3d Cir. 1996), under the then-prevailing standard in *Swain v. Alabama*, 380 U.S. 202, 223-24 (1965). *Batson* altered the evidentiary burden required to prove purposeful discrimination by

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[2]The Court in *Batson* held the discriminatory use of peremptory challenges during jury selection in a defendant's trial violates equal protection. *Id.* at 89-93. The Court established a three-part burden shifting framework to guide a trial court's constitutional review of peremptory strikes. *Id.* at 93-98. "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, . . . the trial court must determine whether the defendant has shown purposeful discrimination." *Miller-El v. Cockrell*, 537 U.S. 322, 328-29 (2003) (citations omitted).

eliminating *Swain*'s requirement that a defendant show a prior pattern of discrimination; instead, it permitted a defendant to establish an equal protection violation based on discrimination in his trial alone. *Batson* "applie[s] retroactively to all cases, state or federal, pending on direct review or not yet final" at the time *Batson* was decided, *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), and therefore applies here. More than twenty-five years after the *voir dire*, we undertake a *Batson* analysis in a case where the defendant did not raise a timely objection at trial.

A.

The Commonwealth contends Abu-Jamal's Batson claim is barred because Abu-Jamal did not raise a contemporaneous objection alleging an equal protection violation under *Swain* or otherwise object to the racial composition of the jury. It contends the Supreme Court in *Batson* presupposed a "timely objection to a prosecutor's challenges" before a court may entertain a claim of racial discrimination in jury selection under *Batson*. Furthermore, it maintains Abu-Jamal's failure to raise the *Batson* issue during trial resulted in a trial record that was not sufficiently developed to support an evaluation of the jury selection practice under *Batson*. Abu-Jamal contends this matter is one of state procedural law and not a prerequisite of the federal claim.

We are not aware of any of our prior state habeas corpus cases (28 U.S.C. § 2254) squarely raising the issue of whether a timely or contemporaneous objection is a prerequisite to a *Batson* claim, so we have not yet directly addressed the issue in any of our prior state habeas cases.[3] On direct appeal of a federal criminal conviction, we found a defendant "waived his objection to the prosecutor's use of her peremptory challenges by failing to make a contemporaneous objection during jury selection." *Gov't of the Virgin Islands v. Forte*, 806 F.2d 73, 75 (3d Cir. 1986), denial of post-conviction relief *rev'd* 865 F.2d 59, 61 (3d Cir. 1989) ("*Batson* equal protection analysis was not triggered [on direct appeal] because Forte had failed to preserve his objections and because we did not find plain error in the trial proceedings.").

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[3]We have addressed *Batson* claims where it does not appear a timely objection had been made at trial. *See, e.g., Wilson v. Beard*, 426 F.3d 653 (3d Cir. 2005); *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001) (en banc). But whether a timely objection is a prerequisite to a *Batson* claim, rather than a matter of state procedural default, was not addressed in these cases, and, as noted, we are not aware of the issue being directly presented to the court. In *Hardcastle v. Horn*, 368 F.3d 246 (3d Cir. 2004), petitioner did not object to the Commonwealth's peremptory challenges during *voir dire*, but following *voir dire* petitioner moved for a mistrial based on the prosecutor's discriminatory use of peremptory challenges. *Id.* at 251.

Although the Supreme Court has never defined timeliness for a Batson claim,[4] the Court in

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[4] Abu-Jamal contends that the Court in *Ford v. Georgia*, 498 U.S. 411 (1991), "made it very clear" that the timing of a *Batson* claim is a state law procedural matter and not a prerequisite to the constitutional claim. The Court in *Ford*, reviewing a state procedural default argument, "look[ed] to local rules for the law governing the timeliness of [the] constitutional claim," but did not directly consider whether a timely objection was a prerequisite to a successful *Batson* claim. *Id.* at 423. *See also McCrory v. Henderson*, 82 F.3d 1243, 1247 n.4, 1249 (2d Cir. 1996) (recognizing that "the Court has never defined timeliness for a *Batson* claim" despite the fact that, in *Ford*, "the Court found that states retain considerable discretion to fashion their own rules governing timeliness").

In a pretrial motion, Ford objected to the use of peremptory challenges in a racially discriminatory manner. *Ford*, 498 U.S. at 413-14. The state court ruled that, under state law, a *Batson* objection must be raised between jury selection and the swearing of the jury and found Ford's *Batson* claim procedurally barred. *Id.* at 422. The Court recognized the state law requirement as "sensible," but, because the requirement was not firmly established and regularly followed at the time of Ford's trial, it held Ford's *Batson* objection timely. *Id.* at 422-24.

The Court did not discuss, and had no reason to discuss, whether a contemporaneous objection was a prerequisite under *Batson* because Ford had previously raised an objection. Furthermore, the state conceded that the petitioner properly raised a *Swain* claim. *Id.* at 420. Even though the Court noted the "appropriateness in general of

(continued...)

Batson "envisioned an objection raised during the jury selection process." *McCrory v. Henderson*, 82 F.3d 1243, 1247 (2d Cir. 1996). But once a proper objection was made, the Supreme Court in *Batson* left to state courts the "particular procedures to be followed *upon a defendant's timely objection* to a prosecutor's challenges." *Batson*, 476 U.S. at 99 (emphasis added). Even though the Court entrusted to states the specific implementation of the *Batson* holding, the remedies the Court envisioned relied on actions by trial judges during *voir dire*. *See id.* at 99 n.24 ("[W]e express no view on whether it is more appropriate in a particular case, upon a finding of discrimination . . ., for the trial court to discharge the venire and select a new jury . . ., or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire.") (internal citations omitted). In *Batson*, the Court first, as a preliminary matter, found Batson made a timely objection to the prosecutor's use of peremptory challenges, and only then remanded the case to the trial court for evaluation of the facts. *Id.* at 100.

Batson permits a party to establish an equal protection violation based on peremptory strikes in

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[4](...continued)
looking to local rules," it did not hold that an objection requirement is exclusively a matter of state law. *Id.* at 423. Accordingly, the *Ford* Court had no reason to engage in the contemporaneous objection discussion we consider here.

a single trial, *id.* at 93-95, and repudiates the *Swain* evidentiary standard, which required proof of discrimination "in case after case," *Swain*, 380 U.S. at 223.[5] Application of *Batson*'s three-part burden-shifting framework requires attention by the trial judge to actions taken during jury selection in the case at hand. To determine whether the prosecutor excluded jurors on the basis of race, the procedure established in *Batson* relies on trial judges to consider "all relevant circumstances" as they occur in the case before it. *Batson*, 476 U.S. at 96. The Court emphasized the trial judge's central role, noting "[w]e have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." *Id.* at 97.

A *Batson* claim requires a fact-intensive inquiry into the prosecutor's use of peremptory

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[5] Despite a reduction in the quantum of proof necessary to establish a claim, "*Batson* did not change the nature of the violation recognized in *Swain*." *Ford*, 498 U.S. at 420. Accordingly, the Supreme Court has held that an objection to jury selection practices alleging an equal protection violation under *Swain* "necessarily states an equal protection violation subject to proof under the *Batson* standard . . . ." *Id.*; *see also Trevino v. Texas*, 503 U.S. 562, 566-67 (1992) (finding defendant in pre-*Batson* criminal case adequately preserved his claim that the state's use of peremptory strikes at his trial violated the Equal Protection Clause).

challenges. A timely objection gives the trial judge an opportunity to promptly consider alleged misconduct during jury selection[6] and develop a complete record.[7] In addition, when a timely

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[6]The value of a prompt determination must not be understated. Peremptory challenges are often based on "subtle, intangible impressions," *McCrory*, 82 F.3d at 1248, and "educated guesses about probabilities based on the limited information available to an attorney about prospective jurors." *United States v. DeJesus*, 347 F.3d 500, 505 (3d Cir. 2003); *see also Hernandez v. New York*, 500 U.S. 352, 360-62 (1991) (plurality opinion) (concluding that prospective jurors' demeanor and hesitancy in answering questions posed by the prosecutor constituted race-neutral grounds for the peremptory challenges). Further, when determining whether the prosecutor's race-neutral explanations are credible, "the best evidence often will be the demeanor of the attorney who exercises the challenge." *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003). Although evaluations based on demeanor and credibility "lie[] peculiarly within a trial judge's province," *id.*, an untimely objection meaningfully hinders the judge's ability to make accurate rulings. *See McCrory*, 82 F.3d at 1248 ("It is nearly impossible for the judge to rule on [*Batson*] objections intelligently unless the challenged juror either is still before the court or was very recently observed."); *Wilkerson v. Collins*, 950 F.2d 1054, 1063 (5th Cir. 1992)("The inquiry is essentially one of fact, dependent on credibility, and the passage of time would diminish the prosecutor's reconstruction of his reasons for striking a venireperson and the judge's evaluation of the juror." (citations omitted)).

[7]In *Galarza v. Keane*, the dissent noted in a different context:

(continued...)

objection is made during voir dire, the trial judge has the opportunity to remedy any defects.[8]

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[7](...continued)

> In addition to allowing the trial court to act in the first instance, potentially correcting the error . . ., timely objection provides a record from which appellate courts can better assess the trial court's reasoning, discourages sandbagging and strategic behavior by trial counsel, and provides the prevailing party with notice of the objector's claims of error . . . . . *Batson* plainly necessitates some form of objection: without some objection, the tripartite, burden-shifting framework established by the Court would never be triggered.

52 F.3d 630, 641-42 (2d Cir. 2001) (Walker, C.J., dissenting).

Additionally, in the related context of 28 U.S.C. § 2254(e)(2), Congress has expressed a strong preference for factual development in state court proceedings. The purpose of § 2254(e)(2) is "to ensure the prisoner undertakes his own diligent search for evidence." *Williams v. Taylor*, 529 U.S. 420, 435 (2000). "Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Taylor v. Horn*, 504 F.3d 416, 437 (3d Cir. 2007) (quoting *Williams*, 529 U.S. at 437). Abu-Jamal's failure to timely object, coupled with his failure to elicit the trial prosecutor's testimony during a PCRA evidentiary hearing, leaves a scant record in support of his *Batson* claim.

[8]Racial discrimination during *voir dire* harms not (continued...)

McCrory, 82 F.3d at 1247 (noting that a timely objection allows an error to be remedied in "a number of ways" including disallowing the challenge, adding additional jurors to the venire, or "begin[ning] anew with a fresh panel"). Even before *Batson*, a timely objection of racial bias involving jury composition would have alerted the judge to errors that might be corrected in the first instance and given the judge the opportunity to develop a complete record of the jury selection process for appellate review.

The most recent guidance from the Supreme Court on *Batson* comes from *Snyder v. Louisiana*, No. 06-10119, 2008 WL 723750 (Mar. 19, 2008), a state capital murder case. Snyder "center[ed] his *Batson* claim on the prosecution's strikes of two black jurors." *Id.* at *4. During *voir dire*, he timely objected to the prosecution's use of peremptory challenges against both jurors. The trial court preserved important venire information. *Id.* at *3 ("Eighty-five prospective jurors were questioned as members of a panel. Thirty-six of these survived challenges for cause; 5 of the 36 were black; and all 5 of the prospective black jurors were eliminated by the prosecution through the use of peremptory

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[8](...continued)
only the defendant, but also the excluded juror as well. *Batson*, 476 U.S. at 87. If a timely objection is not made during jury selection, the harm to the venireperson cannot be addressed by the court.

strikes."). The Supreme Court concluded that "[b]ecause we find that the trial court committed clear error in overruling petitioner's *Batson* objection with respect to [the first juror], we have no need to consider petitioner's claim regarding [the second juror]." *Id.* at *4. Although the Court focused on the third step of *Batson*, it emphasized the trial court's "pivotal role in evaluating *Batson* claims." *Id.* It acknowledged that a *Batson* inquiry

> involves an evaluation of the prosecutor's credibility and the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge. In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.

Id. (citations and quotations omitted). The Court further "recognized that these determinations of credibility and demeanor lie peculiarly within a

trial judge's province" and noted the deference accorded to the trial court. *Id.* (citations and quotations omitted).

Other courts of appeals in state habeas corpus cases have found a failure to timely object bars consideration of a *Batson* claim.[9] The Court of Appeals for the Fifth Circuit held "[t]he evidentiary rule established in *Batson* does not enter the analysis of a defendant's equal protection claim unless a timely objection is made to the prosecutor's use of

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[9]In other contexts, several courts of appeals have held similarly. *See Morning v. Zapata Protein (USA), Inc.*, 128 F.3d 213, 216 (4th Cir. 1997) (holding, in a personal injury case, "that a *Batson* challenge raised after the venire has been excused has been raised too late"); *United States v. Parham*, 16 F.3d 844, 847 (8th Cir. 1994) (holding, on a direct appeal from a federal conviction, "a *Batson* objection must be made at the latest before the venire is dismissed and before the trial commences"); *United States v. Maseratti*, 1 F.3d 330, 335 (5th Cir. 1993) (stating, on a direct appeal from a federal conviction, "that to be timely, the *Batson* objection must be made before the venire is dismissed and before the trial commences" (quoting *United States v. Romero-Reyna*, 867 F.2d 834, 837 (5th Cir. 1989))); *United States v. Cashwell*, 950 F.2d 699, 704 (11th Cir. 1992) (stating, on a direct appeal from a federal conviction, "[t]he failure to make a timely *Batson* objection results in a waiver of the claim"); *Dias v. Sky Chefs, Inc.*, 948 F.2d 532, 534 (9th Cir. 1991) (stating, in a wrongful discharge and intentional infliction of severe emotional distress case, "that *Batson* objections must occur as soon as possible, preferably before the jury is sworn").

his peremptory challenges." *Thomas v. Moore*, 866 F.2d 803, 804 (5th Cir. 1989); *see also McCrory*, 82 F.3d at 1249 ("[W]e hold that the failure to object to the discriminatory use of peremptory challenges prior to the conclusion of jury selection waives the objection."); *Sledd v. McKune*, 71 F.3d 797, 799 (10th Cir. 1995) (concluding there was no basis to review a peremptory challenge when an objection had not been made in the state trial court). In *Thomas*, the court found it did not need to entertain the state's contention that Thomas's *Batson* claim was barred by a state contemporaneous objection rule because "[a] timely objection . . . is requisite to a *Batson* claim." *Thomas*, 866 F.2d at 804; *see also Allen v. Lee*, 366 F.3d 319, 327-28 (4th Cir. 2004) (en banc) (concluding the defendant "did not adequately preserve his *Batson* objection . . . [by remaining silent] after the trial judge's repeated calls for objections after the actual jury selection" and emphasizing the defendant's claim had not been procedurally defaulted); *Wilkerson v. Collins*, 950 F.2d 1054, 1063 (5th Cir. 1992).

Abu-Jamal did not object to the prosecutor's use of peremptory challenges at any point during *voir dire* or at his 1982 trial.[10] Abu-Jamal first

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[10]Our dissenting colleague points to a March 18, 1982 pre-trial motion as evidence that Abu-Jamal arguably presented an objection before trial under the then-prevailing *Swain* standard. But the record demonstrates that

(continued...)

raised the argument that the prosecutor used peremptory strikes in a racially discriminatory manner on direct appeal to the Pennsylvania Supreme Court, which issued its opinion in 1989. *See Abu-Jamal*, 555 A.2d at 849 (finding Abu-Jamal had waived any *Batson* claim because "[n]ot only did he fail to advance the issue in any form resembling that adopted by the Supreme Court in *Batson*, he made no attempt even to frame the issue under the then prevailing rules of *Swain v. Alabama*," but also addressing the merits, stating: "it may be appropriate to relax application of the waiver rule" in a death penalty case). As noted,

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[10](...continued)
Abu-Jamal filed a motion seeking to distribute questionnaires to all prospective jurors prior to their scheduled date for jury service. Transcript of March 18, 1982, at 11. The questionnaires would "not indicate that the case involves Mr. Jamal" and would be a "general survey" with questions about potential venirepersons' backgrounds and locations of residence. Transcript of March 18, 1982, at 14-18. Abu-Jamal's counsel hoped that such a survey would assist his selection of a fair and impartial jury because "in addition to the questionnaire I will have the opportunity to send people to the neighborhood . . . , to check to see how they live, what are their relationships to the criminal justice system and what hidden hostilities they have in the hidden recesses of their subconscious mind, what their childhood problems were that might allow them to be triggered by something in the courtroom." Transcript of March 18, 1982, at 13, 18. Abu-Jamal's motion to distribute a questionnaire to all prospective jurors is different from lodging a timely objection during the jury selection process.

there are also prudential reasons for requiring a timely objection at trial to preserve a *Batson*-type claim for appellate review. Although none of our prior cases have directly confronted or ruled on this issue,[11] we believe a timely objection is required to preserve this issue on appeal. Accordingly, Abu-Jamal has forfeited his *Batson* claim by failing to make a timely objection. But, even assuming Abu-Jamal's failure to object is not fatal to his

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[11]We have, however, recognized the evidentiary problems that occur when a timely objection has not been made. *See Hardcastle v. Horn*, 368 F.3d 246, 255 (3d Cir. 2004) ("[R]etroactive application of *Batson* causes unique evidentiary problems for reviewing courts, as the three-step *Batson* inquiry . . . did not occur during *voir dire* in these cases."); *Deputy v. Taylor*, 19 F.3d 1485, 1492 (3d Cir. 1994) ("Because we assume *Batson*'s application, we need not decide this question [whether *Batson* applies to cases where an objection to jury selection had not been made in the criminal case itself, but] . . . [n]evertheless, argument on delay is not without all force.").

In *Uttecht v. Brown*, 127 S. Ct. 2218 (2007), assessing a state trial court's removal of a juror for cause, the Court did not consider inconsequential a defendant's failure to make a timely objection when evaluating jury selection procedures at trial. *Id.* at 2229 ("By failing to object, the defense did not just deny the conscientious trial judge an opportunity to explain his judgment or correct any error. It also deprived reviewing courts of further factual findings that would have helped to explain the trial court's decision."). The Court recognized the defendant's failure to object as a factor to consider in its analysis. *Id.*

claim, Abu-Jamal has failed to meet his burden in proving a prima facie case.

B.

Before we address the merits of the *Batson* claim, we must first consider procedural default. Besides the argument that *Batson* requires a contemporaneous objection at trial, the Commonwealth contends Abu-Jamal's failure to raise an objection to jury selection before trial renders it procedurally defaulted for purposes of habeas review. As noted, Abu-Jamal first raised the *Batson* claim on direct appeal to the Pennsylvania Supreme Court. *See Abu-Jamal*, 555 A.2d at 849.

On direct appeal, the Pennsylvania Supreme Court found Abu-Jamal had waived any *Batson* claim because he had not made an objection, in any form, during *voir dire* or at trial to the prosecutor's use of peremptory challenges. *Id.* The court stated:

> There can be no doubt that under the longstanding teaching of *Commonwealth v. Clair*, 326 A.2d 272 (Pa. 1974), the appellant has waived any claim that the prosecutor engaged in discriminatory use of peremptory challenges to obtain an unrepresentative jury. Not only did he fail to advance the issue in any form

> resembling that adopted by the Supreme Court in *Batson*, he made no attempt even to frame the issue under the then prevailing rules of *Swain v. Alabama*, 380 U.S. 202 (1965).

Id. But the court then said:

> We have, at times, indicated that because of the extreme, indeed irreversible, nature of the death penalty, it may be appropriate to relax application of the waiver rule and address the merits of arguments raised for the first time in the direct appeal to this Court. In other capital cases, however, we have held that certain issues were waived for failure to raise them before the trial court. In light of this, the Commonwealth has argued in the alternative – waived or not, the appellant's claim of improper use of peremptories is without merit.

Id. (citation omitted). Without stating whether it was relaxing the waiver rule or not, the court proceeded to discuss the merits of Abu-Jamal's *Batson* claim and deny relief.[12]

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[12]In a subsequent discussion regarding Abu-Jamal's

(continued...)

On collateral review, the PCRA court recognized the Pennsylvania Supreme Court's discussion on the merits as an "alternative resolution" of the *Batson* claim. *PCRA Op.*, 1995 WL 1315980, at *103. Nonetheless, it concluded that the claim was not subject to further review under 42 Pa. Cons. Stat. § 9544(a) because it had been previously

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[12](...continued)
challenge to statements made during the prosecutor's closing argument, the court stated:

> It must be acknowledged that were this not a capital case, this claim of error would be summarily dismissed as having been waived. No objection was made at the time of trial, the issue was not addressed in post-verdict motions, and appellate counsel has not claimed that trial counsel's ineffective assistance in this regard is a special circumstance justifying appellate review despite the waiver. Nevertheless, we will address it on the merits in light of "relaxation" of the waiver rule previously noted as being appropriate in capital cases.

Id. at 854.

Pennsylvania state courts have since disavowed application of the relaxed waiver rule, but, at the time of Abu-Jamal's state appeals, an "unforgiving waiver rule was not consistently and regularly applied." *Albrecht v. Horn*, 485 F.3d 103, 116 (3d Cir. 2007) (internal quotations omitted).

litigated on the merits.[13] *Id.* at *102. Further, the PCRA court readdressed the merits of the *Batson* claim after the Commonwealth withdrew a previous objection to the introduction of new evidence and a stipulation was admitted. The PCRA court concluded that "to the extent the instant claim was cognizable, it was [Abu-Jamal's] burden to prove that the [Pennsylvania Supreme Court's] analysis was in some respect incorrect. This, he fails to do." *Id.* at *104.

On appeal of the denial of state collateral relief (PCRA), Abu-Jamal challenged the previous *Batson* rulings on ineffective assistance of counsel grounds as well as on the merits. The Pennsylvania Supreme Court found that Abu-Jamal's

> argument as to the specific instances [of ineffective assistance] is largely

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[13]The PCRA court likely relied on 42 Pa. Cons. Stat. § 9544(a) ("[A]n issue has been previously litigated if: . . . (2) the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue . . . .") rather than § 9544(b) ("[A]n issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.") because it applied the relaxed waiver rule throughout the opinion. *See PCRA Op.*, 1995 WL 1315980, at *70 n.28 ("Since the instant matter resulted in a sentence of death, this Court will relax the waiver rule and make findings and conclusions based on the merits of each issue presented.").

> redundant as he has elsewhere in this appeal raised the underlying merits respecting each of those instances and therein also included a claim of counsel's ineffectiveness. Accordingly, as this court has found no merit to any of those underlying claims, we need not, at this point, again individually analyze the claims since there can be no finding of ineffectiveness where the underlying claim lacks merit.

PCRA Appeal Op., 720 A.2d at 108.[14] The court implied that it first addressed the claims on the merits, then denied relief on the specific claims of ineffective assistance due to lack of merit. When addressing Abu-Jamal's *Batson* claim the court did not explain whether it was addressing the claim directly or through the lens of ineffective assistance of counsel. The court ultimately denied relief, concluding that, on the merits, "we would still arrive

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[14]Under Pennsylvania law, to obtain relief on a claim of ineffective assistance of counsel, Abu-Jamal was required to demonstrate that: "(1) the underlying substantive claim has arguable merit; (2) counsel whose effectiveness is being challenged did not have a reasonable basis for his or her actions or failure to act; and (3) the petitioner suffered prejudice as a result of that counsel's deficient performance." *Commonwealth v. McGill*, 832 A.2d 1014, 1020 (Pa. 2003); *see also Commonwealth v. LaCava*, 666 A.2d 221, 229 (Pa. 1995).

at the same resolution of this issue that we did on direct appeal." *Id.* at 114.

A federal habeas court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Lambrix v. Singletary*, 520 U.S. 518, 522 (1997) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). A state procedural rule provides an independent and adequate basis for precluding federal review if "(1) the state procedural rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner's claims on the merits; and (3) the state courts' refusal in this instance is consistent with other decisions." *Doctor v. Walters*, 96 F.3d 675, 683-84 (3d Cir. 1996).

As noted, for a claim to be procedurally defaulted, "all state appellate courts [must have] refused to review the petitioner's claims on the merits . . . ." *Albrecht*, 485 F.3d at 115 (internal quotations omitted). "[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263 (1989) (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)) (internal citations omitted); *see also Smith v. Freeman*, 892 F.2d 331, 337 (3d Cir.

1989) ("[W]e are not bound to enforce a state procedural rule when the state itself has not done so, even if the procedural rule is theoretically applicable to our facts."). Our review is "foreclosed when the state court addresses the merits of the federal claim only in the course of resolving another, independent [ineffective assistance of counsel] claim." *Sistrunk v. Vaughn*, 96 F.3d 666, 675 (3d Cir. 1996).

The Pennsylvania Supreme Court, in its review of the PCRA court, did not clearly and expressly make a finding of procedural default or waiver with respect to the *Batson* claim. The court only discussed waiver with respect to those claims not raised on direct appeal. *See PCRA Appeal Op.*, 720 A.2d at 88 n.9 (finding the relaxed waiver doctrine has no applicability to claims not raised on direct appeal). Further, the Supreme Court did not clearly state whether it was addressing the merits of the *Batson* claim in the course of resolving the ineffective assistance of counsel claim. Nor did the Supreme Court identify which claims, if any, it would address only as ineffective assistance of counsel claims. *Id.* at 113-14. Without a clear and express statement that the state court denied relief on independent state procedural grounds, we cannot find the claim procedurally defaulted.[15]

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[15]In a recent case, we came to the same conclusion

(continued...)

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[15](...continued)
through a related analysis. *See Holland v. Horn*, Nos. 01-9001 & 01-9002, 2008 WL 607486 (3d Cir. Mar. 6, 2008). "'The procedural default doctrine precludes a federal habeas court from reviewing a question of federal law decided by a state court if the decision of that court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.'" *Id.* at *2 (quoting *Bronshtein v. Horn*, 404 F.3d 700, 707 (3d Cir. 2005)). "[T]he state rule must have been announced prior to its application in the petitioner's case and must have been 'firmly established and regularly followed.'" *Fahy v. Horn*, Nos. 03-9008 & 03-9009, 2008 WL 191643, at *9 (3d Cir. 2008) (quoting *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991)); *see also Holland*, 2008 WL 607486, at *2 ("[S]tate procedural rules have been held to be inadequate if they are not 'firmly established and regularly followed' . . . ." (quoting *Bronshtein*, 404 F.3d at 707)).

Although the Pennsylvania Supreme Court later abrogated the relaxed waiver rule, *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998), at the time of Abu-Jamal's "purported waiver the Court's practice was to address all issues arising in a death penalty case even if the issue had been waived." *Fahy*, 2008 WL 191643, at *10. *See also Holland*, 2008 WL 607486, at *5 ("It is clear there was not a firmly established and regularly followed Pennsylvania procedure governing the presentation of relief from death sentences . . . ."). Since an "unforgiving waiver rule was not consistently and regularly applied" during Abu-Jamal's trial, direct appeals, or post-conviction appeals, the state law procedural grounds are not an adequate basis to support the judgment and cannot be a ground for procedural default. *Albrecht*, 485 F.3d at 116. Accordingly, Abu-Jamal has not procedurally defaulted his claim.

C.

During *voir dire*, the prosecution exercised fifteen out of its twenty available peremptory challenges and removed ten black potential jurors from the venire. Abu-Jamal did not object to any of the peremptory challenges. Abu-Jamal struck at least one black juror that had been accepted by the prosecution. At the close of jury selection, the jury was composed of nine white jurors and three black jurors. The court later dismissed one of these black jurors, for unrelated reasons, after the trial began. The final empaneled jury consisted of ten white jurors and two black jurors. The record does not reveal the total number of venirepersons or the racial composition of the venire.

We now consider the merits of Abu-Jamal's *Batson* claim. As noted, we are guided by 28 U.S.C. § 2254(d)(1), which instructs us to determine whether the Pennsylvania Supreme Court's decision was contrary to, or involved an unreasonable application of, United States Supreme Court precedent. *Schriro v. Landrigan*, 127 S. Ct. 1933, 1939 (2007); *Williams v. Taylor*, 529 U.S. 362, 405-06, 410-13 (2000). Abu-Jamal contends the prosecutor's use of peremptory strikes at trial violated his equal protection rights under *Batson*, and maintains the record establishes a "pattern" of discrimination that gives rise to an inference of discrimination. In *Batson*, the Supreme Court established a three-part burden-shifting framework for

determining the constitutionality of peremptory challenges. 476 U.S. at 96-98. First, the defendant must establish a prima facie case of purposeful discrimination. Second, if a prima facie case is found, the prosecution must articulate a race-neutral justification for the challenged strikes. Third, after considering both parties' submissions, the trial court must determine whether the defendant has established purposeful discrimination. *Id.*; *see also Miller-El*, 537 U.S. at 328-29.

> To establish a prima facie case,
>
> > the defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate.

Batson, 476 U.S. at 96 (quotations and citations omitted). A prima facie case will be found if, after considering these facts and all relevant circumstances, the "evidence [is] sufficient to permit the trial judge to draw an inference that discrimination has occurred" in the prosecutor's exercise of

peremptory challenges. *Johnson v. California*, 545 U.S. 162, 170 (2005). In *Batson*, the Court provided two examples of "relevant circumstances" courts could consider in deciding whether a defendant has established a prima facie case: (1) "a 'pattern' of strikes against black jurors included in the particular venire"; and (2) "the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges."[16] 476 U.S. at 97. The Supreme Court clarified in *Johnson* that the Court

> did not intend the first step to be so onerous that a defendant would have to persuade the judge–on the basis of all the facts, some of which are impossible for the defendant to know with

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[16]In *United States v. Clemons*, 843 F.2d 741 (3d Cir. 1988), a federal criminal case on direct review, we noted "[w]hen assessing the existence of a prima facie case, trial judges should examine all relevant factors, such as: how many members of the 'cognizable racial group' . . . are in the [venire] panel; the nature of the crime; and the race of the defendant and the victim," in addition to the two factors specifically mentioned in *Batson*. *Id.* at 748; *see also Deputy*, 19 F.3d at 1492 (noting one of the factors a trial court should consider when determining whether a defendant has presented a prima facie *Batson* issue is "how many members of the cognizable racial group are in the venire panel from which the petit jury is chosen").

> certainty–that the challenge was more likely than not the product of purposeful discrimination.

545 U.S. at 170.

D.

Abu-Jamal first raised a *Batson* claim on direct appeal, contending the prosecution improperly used peremptory challenges at his trial. *Abu-Jamal*, 555 A.2d at 848. The Pennsylvania Supreme Court, addressing the *Batson* claim, found Abu-Jamal had not established a prima facie case. *Id.* at 850. The court held "that mere disparity of number in the racial make-up of the jury, though relevant, is inadequate to establish a prima facie case." *Id.* Additionally, the court found there was no pattern in the prosecutor's use of peremptory challenges based on factual findings that the Commonwealth used fifteen of twenty available peremptory challenges to remove eight black potential jurors. *Id.* The court also examined the prosecutor's statements and comments during *voir dire* and found "not a trace of support for an inference that the use of peremptories was racially motivated." *Id.* The Pennsylvania Supreme Court did not make any findings as to the racial composition of the entire venire.

The PCRA court found the "Commonwealth did not intentionally or racially discriminate

against African-American jurors in its use of peremptory strikes in violation of *Batson* and its progeny." *PCRA Op.*, 1995 WL 1315980, at *102. On review of the PCRA court's denial of post-conviction relief, the Pennsylvania Supreme Court reiterated its finding that Abu-Jamal had not established a prima facie case. *PCRA Appeal Op.*, 720 A.2d at 114. Even though the *Batson* issue had been addressed on direct appeal, the court reconsidered the issue in light of a stipulation by both parties that the prosecution had used peremptory challenges to remove ten rather than eight black venirepersons. The court found "[e]ven assuming . . . [this stipulation], we would still arrive at the same resolution of this issue that we did on direct appeal . . . [that a]ppellant's current claim . . . warrants no relief." *Id.*

The District Court did not find objectively unreasonable the Pennsylvania Supreme Court's determination that Abu-Jamal had not established a prima facie case. *Abu-Jamal*, 2001 WL 1609690, at *107. The District Court noted four missing pieces of evidence often used when evaluating whether a defendant had established a prima facie case: (1) the racial composition of those jurors dismissed by the defendant; (2) the total number of jurors in the venire; (3) the racial composition of the entire venire; and (4) the number and race of those dismissed for cause. *Id.* at *106. In addition, the District Court found Abu-Jamal had not pointed to any improper statements or questions by

the prosecution during *voir dire*. *Id.* After reviewing the state court's factual findings, the District Court found the AEDPA standard requires deference to these factual findings and the state supreme court's ruling. *Id.* at *107. The District Court found "federal law as set forth in *Batson* does not require" an outcome contrary to the state court's holding that Abu-Jamal failed to establish a prima facie case. *Id.*

The Pennsylvania Supreme Court concluded Abu-Jamal had not established a prima facie case. Accordingly, we need only review this first step of the *Batson* standard to determine whether the Pennsylvania Supreme Court's conclusion was an unreasonable application of clearly established federal law as determined by the United States Supreme Court. We begin with *Batson*, which provides that a "pattern" of discrimination is one relevant factor that may give rise to a prima facie case. *Batson*, 476 U.S. at 97. The Court in *Batson* did not articulate the evidence necessary to demonstrate a pattern, except to note, "[i]n cases involving the venire, this Court has found a prima facie case on proof that members of the defendant's race were substantially underrepresented in the venire from which the jury was drawn . . . ." *Id.* at 94 (citing *Whitus v. Georgia*, 385 U.S. 545, 552 (1967)). In *Batson*, the Court found the prosecutor's use of his peremptory challenges to remove all four black members of the venire raised an inference of

discrimination. *Id.* at 100; *see also Johnson*, 545 U.S. at 169-70.

The Supreme Court has found prima facie *Batson* cases based on a pattern of discrimination, but only where the trial record has indicated both the strike rate and the racial composition of the venire. The strike rate is computed by comparing the number of peremptory strikes the prosecutor used to remove black potential jurors with the prosecutor's total number of peremptory strikes exercised. This statistical computation differs from the "exclusion rate," which is calculated by comparing the percentage of exercised challenges used against black potential jurors with the percentage of black potential jurors known to be in the venire. *See Overton v. Newton*, 295 F.3d 270, 278 n.9 (2d Cir. 2002) (discussing the use of this evidence to determine statistical disparities in jury selection processes).

In *Miller-El v. Cockrell*, on which Abu-Jamal relies to demonstrate a pattern of discrimination, the Supreme Court evaluated the prosecution's jury selection procedures in considering whether the Court of Appeals for the Fifth Circuit erred in not granting a certificate of appealability. *Miller-El*, 537 U.S. at 331. The Court found "statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." *Id.* at 342. But in reaching this conclusion regarding the statistical

evidence, the Court considered evidence that "[t]he prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members . . . [and i]n total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans." *Id.* In reaching this conclusion regarding the statistical evidence, the Court in *Miller-El* relied upon both the strike rate and the exclusion rate. Similarly, in *Johnson*, the Court considered evidence that the prosecution used three of twelve peremptory challenges to remove all three black prospective jurors in the venire. 545 U.S. at 164, 173; *see also People v. Johnson*, 71 P.3d 270, 272 (Cal. 2003). In both cases, the Court relied upon evidence of the racial composition of the venire. Neither case addresses a situation in which the strike rate and the exclusion rate are unknown. *Cf. Schriro*, 127 S. Ct. at 1942 (finding that the state court's conclusion was not objectively unreasonable because the Supreme Court had "never addressed a situation like this").

Some courts of appeals have noted the significance of considering the prosecution's strike rate in relation to the racial composition of the venire when evaluating whether a party has established a prima facie case under *Batson*. The Court of Appeals for the Eleventh Circuit in *United States v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005), found "[w]hile statistical evidence may support an inference of discrimination, it can do so only when placed in context. For example, the number of

persons struck takes on meaning *only* when coupled with other information such as the racial composition of the venire . . . ." *Id.* at 1044 (internal citations omitted). The court upheld the district court's finding that the defendant had not established a prima facie case based on a pattern of discrimination where the prosecution used five out of nine peremptory challenges to remove Hispanic potential jurors, in part because the prosecution's strike rate was proportional to the composition of the venire, and in part because the prosecution also selected six Hispanics to serve on the jury. *Id.* at 1044, 1047.

In *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004), the Court of Appeals for the Fifth Circuit denied a certificate of appealability for a *Batson* claim on the ground that the number of peremptory strikes alone is insufficient to establish a prima facie case without evidence of the racial composition of the entire venire. *Id.* at 278-79; *see also Sorto v. Herbert*, 497 F.3d 163, 171 (2d Cir. 2007) ("When, as here, a *Batson* prima facie case depends on a pattern of strikes, a petitioner cannot establish that the state court unreasonably concluded that the pattern was not sufficiently suspicious unless the petitioner can adduce a record of the baseline factual circumstances attending the *Batson* challenge . . .[, which] would likely include evidence such as the composition of the venire . . . . 'Whether [a strike] rate creates a statistical disparity would require knowing the minority percentage

of the venire . . . .'" (quoting *United States v. Alvarado*, 923 F.2d 253, 255 (2d Cir. 1991)) (emphasis in original omitted)); *Walker v. Girdich*, 410 F.3d 120, 123 (2d Cir. 2005) (finding a prima facie case had not been established based on a pattern of discrimination where the prosecutor used twelve out of thirteen peremptory strikes against black members of the venire because the record did not indicate the racial composition of the entire venire); *United States v. Esparsen*, 930 F.2d 1461, 1467 (10th Cir. 1991) ("By itself, the number of challenges used against members of a particular race is not sufficient to establish or negate a prima facie case . . . . In this case, for instance, the prosecution's use of 71% (5/7) of its challenges against Hispanics would acquire some statistical meaning if we knew the percentage of Hispanics in the venire.") (internal quotations omitted). In *Medellin*, the prosecution used six out of thirteen strikes to remove black members of the venire; the defendant did not provide any additional evidence to support his prima facie case. 371 F.3d at 278. The Court of Appeals for the Fifth Circuit held:

> For the statistical evidence to be relevant, data concerning the entire jury pool is necessary. The number of strikes used to excuse minority and male jury pool members is irrelevant on its own. Indeed, depending on the make-up of the jury pool, such numbers could indicate that the state

> discriminated against Anglos and females.

Id. at 278-79.

Here, Abu-Jamal contends the record facts demonstrate a "pattern of strikes against black jurors" in the venire.[17] Under *Batson*'s first step, Abu-Jamal has the burden to develop a record sufficient to establish a pattern of discrimination that gives rise to an inference of discrimination. The record shows the prosecution used ten peremptory strikes to remove black venirepersons from the petit jury out of a total of fifteen peremptory strikes exercised, resulting in a strike rate of 66.67%. *See PCRA Op.*, 1995 WL 1315980, at *103.

There is no factual finding at any level of adjudication, nor evidence from which to determine the racial composition or total number of the entire venire – facts that would permit the computation of

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[17]Abu-Jamal makes other allegations to support his prima facie case, including: (1) Abu-Jamal is black and Faulkner was white; (2) Abu-Jamal is black and the prosecutor exercised peremptory strikes to remove black potential jurors; (3) Faulkner was a police officer, as were key witnesses; (4) the prosecutor's questions and statements during *voir dire*; and (5) a culture of discrimination in the Philadelphia District Attorney's Office. Abu-Jamal has not demonstrated that these allegations make the Pennsylvania Supreme Court's decision objectively unreasonable.

the exclusion rate and would provide important contextual markers to evaluate the strike rate.[18] *See Deputy*, 19 F.3d at 1492 (finding defendant had not established a prima facie case because of undeveloped record, including failure to present evidence on the venire's racial composition, caused by delay in raising *Batson* claim). As noted, *Batson* was decided in April 1986, after the trial. Abu-Jamal first raised a *Batson* claim on direct appeal to the Pennsylvania Supreme Court, which rejected it in a 1989 decision. At the 1995 PCRA evidentiary hearing, which occurred nine years after *Batson* was decided, Abu-Jamal had the trial prosecutor under subpoena and had the opportunity to call him to testify. But Abu-Jamal did not take this action. At the first *Batson* step, it was Abu-Jamal's burden to establish a prima facie case, and the trial prosecutor's testimony might have provided relevant evidence to support a prima facie case.[19]

Under AEDPA's deferential standard of review, the record is fatally deficient to support a

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[18]Abu-Jamal contends the prosecutor had the opportunity to strike thirty-nine venirepersons, of which fourteen were allegedly black, but he does not cite any record support for these numbers. We see no record support for these numbers.

[19]Abu-Jamal's failure to take the opportunity to elicit the prosecutor's testimony is noteworthy considering the absence of a developed record to support a prima facie case.

successful challenge to the Pennsylvania Supreme Court's decision finding no prima facie case under *Batson*. As noted, the record does not include evidence of the number or racial composition of the venire.[20] Without this evidence, we are unable to determine whether there is a disparity between the percentage of peremptory strikes exercised to remove black venirepersons and the percentage of black jurors in the venire. Abu-Jamal had the opportunity to develop this evidence at the PCRA evidentiary hearing, but failed to do so. There may be instances where a prima facie case can be made without evidence of the strike rate and exclusion rate. But in this case, we cannot find the Pennsylvania Supreme Court's ruling unreasonable based on this incomplete record.

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[20]In *Clemons*, a federal criminal case on direct appeal, we noted the number of racial group members in the venire is a relevant factor a trial judge could consider when assessing a prima facie case. But we did not bar trial judges from considering other circumstances, noting that although "[s]ituations may arise where trial judges find it relevant to examine other factors, such as the percentage of the 'cognizable racial group' in the jury pool, or the racial composition of the district . . ., [w]e do not envision such inquiries as mandatory." *Clemons*, 843 F.2d at 748 n.5. In *Clemons*, the record established the prosecutor had used "peremptory challenges to strike the only two blacks on the jury panel." *Id.* at 742. In contrast, the record here does not establish the number of black potential jurors in the venire. We are unable to determine a statistical disparity here without this evidence.

Although we have cited the importance of the venire's racial composition, *see, e.g., Clemons*, 843 F.2d at 748; *Deputy*, 19 F.3d at 1492, we have previously found prima facie *Batson* claims established without this record evidence.[21] But we believe

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[21]Abu-Jamal cites *Holloway v. Horn*, 355 F.3d 707, 729-30 (3d Cir. 2004), for support. But *Holloway* is inapplicable to this case because it did not apply the deferential standards provided by AEDPA § 2254(d). In *Holloway*, the court found that the state court "plainly did not render an 'adjudication on the merits' of [Petitioner's *Batson*] claim for purposes of applying the AEDPA standards." *Id.* at 719. As a result, instead of applying AEDPA's deferential standard of review, the court applied pre-AEDPA standards and reviewed the legal conclusions of the state courts *de novo*. *Id.* Because the court held that § 2254(d) did not apply, the court's alternative conclusions under AEDPA, *see id.* at 729-30, are dicta.

Additionally, *Holloway* is distinguishable on the facts. In *Holloway*, we found a prima facie case based primarily on the prosecution's pattern of strikes. *Id.* at 722. The record demonstrated that "Holloway moved for a mistrial after the prosecutor had used seven of eight peremptory strikes against African-Americans; the Commonwealth ultimately used eleven of twelve strikes in that manner." *Id.* We also considered in *Holloway* the difference in race of the officer who took Holloway's custodial statement, who was white and on whose testimony and perceived credibility "Holloway's defense would rise or fall," and the defendant and victim, both black. *Holloway*, 355 F.3d at 723.

In *Hardcastle*, unlike in this case, the exclusion rate was known. 368 F.3d at 251 ("During the course of jury

(continued...)

those cases can be distinguished on their facts. Even where we have found a pattern of discrimination sufficient to establish a prima facie case under *Batson*, the prosecution had used a greater percentage of its strikes to remove black potential jurors from the venire than the percentage we find in the record here. As noted, here the prosecution used ten of fifteen peremptory strikes against black potential jurors. We have never found a prima facie case based on similar facts.

In *Brinson v. Vaughn*, 398 F.3d 225 (3d Cir. 2005), we found a prima facie showing based on the strike rate alone, where the prosecution had used thirteen of fourteen peremptory challenges to remove black venirepersons. Although we found the high strike rate sufficient to establish a prima facie case in *Brinson*, we noted that the racial composition of the venire, if composed almost entirely of black venirepersons, could "provide an innocent explanation" that would weigh against finding a pattern of discrimination. *Id.* at 235.[22]

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[21](...continued)
selection at his trial, the prosecutor used her peremptory strikes, of which she had a total of twenty, to remove twelve of the fourteen African-American members of the venire.").

[22]Abu-Jamal relies on *Simmons v. Beyer*, 44 F.3d 1160 (3d Cir. 1995), to support his prima facie showing. But *Simmons* is inapposite here. *Simmons* involved a *Batson* claim intertwined with a speedy trial claim after a thirteen-year
(continued...)

At issue is whether the Pennsylvania Supreme Court unreasonably applied Supreme Court precedent. Our standard on collateral review is whether the state's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). AEDPA creates "an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings," and we are guided by the statute's "binding[] directions to accord deference." *Uttecht*, 127 S. Ct. at 2224; *see also* 28 U.S.C. § 2254(d); *Schriro*, 127 S. Ct. at 1939; *Williams*, 529 U.S. at 413. The Pennsylvania Supreme Court addressed the *Batson* claim on the merits, *see Abu-Jamal*, 555 A.2d at 848-50; *PCRA Appeal Op.*, 720 A.2d at 555-56, and accordingly, we apply § 2254(d).[23] Abu-Jamal has not provided sufficient evidence to establish that the

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[22](...continued)
"egregious delay" between Simmons's sentencing and his direct appeal. *Id.* at 1163, 1165, 1171. In addition, an objection was raised at trial in *Simmons*. *Id.* at 1167.

[23]The Pennsylvania Supreme Court's decision was not contrary to Supreme Court precedent. Because the court identified and applied the correct legal standard, *Batson*, it did not apply "a rule that contradicts the governing law set forth" by the Supreme Court, nor are the facts here "materially indistinguishable" from the facts in *Batson*. *Williams*, 529 U.S. at 405.

Pennsylvania Supreme Court's determination was an unreasonable application of *Batson*. It was not objectively unreasonable to find Abu-Jamal had not established a prima facie case based on either a pattern of peremptory strikes or any other circumstances.

IV.

Abu-Jamal contends his constitutional rights were violated when the prosecutor, during his guilt-phase summation, stated that if the jury should find Abu-Jamal guilty, "of course there would be appeal after appeal and perhaps there could be a reversal of the case, or whatever, so that may not be final." This comment, Abu-Jamal maintains, undermined the reasonable doubt standard and the jury's sense of responsibility for its verdict by suggesting that if jurors were unsure of his guilt, they should nevertheless convict because there would be further review in later proceedings. Abu-Jamal contends this violated his rights to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the Constitution.

The Commonwealth contends the prosecutor's comments did not infringe Abu-Jamal's right to a jury trial, his right to the presumption of innocence, or his right not to be convicted unless proven guilty beyond a reasonable doubt. Rather, when viewed in their full context, the Commonwealth contends, the prosecutor's comments

accurately informed the jury of the appellate court's role. The acknowledgment of an appeals process, the Commonwealth contends, is common knowledge and was not improper. In addition, the Commonwealth contends the judge emphasized at several points in the trial that only the court was responsible for determining all matters of law and that the arguments of the attorneys were neither law nor evidence. These instructions, the Commonwealth contends, were sufficient to overcome any possible misunderstanding.

On direct review, the Pennsylvania Supreme Court concluded Abu-Jamal had waived this claim by failing to object to the prosecutor's comments when they were made, and by failing to raise it in post-trial motions or as part of an ineffective assistance of counsel claim. *Abu-Jamal*, 555 A.2d at 854. The Pennsylvania Supreme Court noted that in a non-capital case the claim would be summarily dismissed as having been waived. *Id.* But it decided to address the claim on the merits in light of the relaxed waiver rule then used in capital cases. *Id.* Addressing the claim on the merits, the court applied the rule that "a new trial is not required unless the unavoidable effect of the prosecutor's language would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant, so that they could not weigh the evidence and render a true verdict." *Id.* (citing *Commonwealth v. Burton*, 417 A.2d 611 (Pa. 1980)). The court found that "[i]n the context of the entire

summation, it is clear that the prosecutor was not attempting to suggest the jury should resolve any doubts by erring on the side of conviction because an error on the side of acquittal would be irreversible." *Abu-Jamal*, 555 A.2d at 854-55. The court added:

> In light of the [trial] court's repeated instructions to the jury that the arguments of counsel were neither evidence nor statements of the law to be followed, and the instructions on the Commonwealth's burden of proving all elements of the crime charged beyond a reasonable doubt, we are not persuaded that the isolated comments now complained of deprived the appellant of a fair trial.

Id. at 855. We note Abu-Jamal did not specifically challenge the "appeal after appeal" comment before the PCRA court or in his PCRA appeal to the Pennsylvania Supreme Court.

On federal habeas review, the District Court determined that the Pennsylvania Supreme Court's direct review ruling on the "appeal after appeal" comment was neither contrary to nor an unreasonable application of the law, and that the comments did not render the jury's verdict unconstitutional. *Abu-Jamal*, 2001 WL 1609690, at *93. The court held that *Caldwell v. Mississippi*, 472 U.S. 320

(1985), discussed *infra*, is applicable only to certain types of comments made to the jury during sentencing, and it determined that "in the context of the entire trial, this comment did not deprive petitioner of a fair trial." *Abu-Jamal*, 2001 WL 1609690, at *93. The District Court noted that the prosecutor's comments, in their larger context, "stressed the importance of the jury's responsibility," and that the statements were neither misleading nor inaccurate. *Id.* (citing *Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1985)). Finally, the District Court noted that the trial court had repeatedly instructed the jury that counsel's arguments were not evidence or law. *Abu-Jamal*, 2001 WL 1609690, at *93. The District Court concluded that "considering the totality of these circumstances, this remark did not so infect petitioner's trial as to render it unconstitutional." *Id.*

Because the Pennsylvania Supreme Court applied the relaxed waiver rule and addressed the claim on its merits, we will address it here. In support of his claim, Abu-Jamal relies on *Caldwell*, in which a prosecutor told a capital sentencing jury the defense "would have you believe that you're going to kill this man and they know – they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it." *Caldwell*, 472 U.S. at 325. The trial court overruled a contemporaneous objection by the defense and the prosecutor proceeded to tell the jury "the decision you render is

automatically reviewable by the [state] Supreme Court. Automatically . . . ." *Id.* at 325-26.

The Supreme Court vacated the death sentence that resulted from the bifurcated *Caldwell* trial, citing its concern whether the "capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'" *Id.* at 341. In *Caldwell*, the Court determined that the jury's awareness was undercut by the prosecutor's comments and the trial court's response. First, the trial judge failed to correct, and openly agreed with, the prosecutor's statement, "strongly implying that the prosecutor's portrayal of the jury's role was correct." *Id.* at 339. Second, the comments painted an image of the jury's role in capital sentencing that was "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Id.* at 340 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)).

Abu-Jamal concedes that *Caldwell* is limited to capital sentencing, but suggests there is a "close analogy" between comments made to the jury during the guilt phase and the sentencing phase. He relies on several state court cases, nearly all of which predate the Supreme Court's approval of bifurcated capital trials. Some of these cases turn on the prosecutor's factual misstatements to the

jury about state appellate procedure; some were decided on altogether different grounds; some are inapplicable here because, like *Caldwell*, they involve the penalty phase of trial, instructions given by the trial judge, or comments made at other points in the trial; and some involve comments by prosecutors that far exceeded those challenged here. *See. e.g., State v. Jones*, 251 S.E.2d 425 (N.C. 1979); *State v. Hines*, 211 S.E.2d 201 (N.C. 1975); *People v. Morse*, 388 P.2d 33 (Cal. 1964); *Pait v. State*, 112 So. 2d 380 (Fla. 1959); *People v. Johnson*, 30 N.E.2d 465 (N.Y. 1940); *Davis v. State*, 161 N.E. 375 (Ind. 1928); *Hammond v. State*, 120 S.E. 539 (Ga. 1923); *Blackwell v. State*, 79 So. 731 (Fla. 1918); *Beard v. State*, 95 So. 333 (Ala. Crim. App. 1923).

The Pennsylvania Supreme Court was not objectively unreasonable in determining *Caldwell* was inapplicable because the comments at issue were made during the guilt phase. *See Darden*, 477 U.S. at 183 n.15 (noting *Caldwell* applies to "comments by a prosecutor during the sentencing phase of trial to the effect that the jury's decision as to life or death was not final, [and] that it would automatically be reviewed by the [s]tate Supreme Court, and that the jury should not be made to feel that the entire burden of the defendant's life was on them"); *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) ("[*Caldwell* is] relevant only to certain types of comment[s] – those that mislead the jury . . . to feel less responsible than it should for the sentencing

decision.") (internal quotations omitted). In addition, the Pennsylvania Supreme Court was not objectively unreasonable in concluding the trial was not so infected with unfairness as a result of these comments that Abu-Jamal's due process rights were violated. Together, the prosecutor's full statement to the jury and the court's instructions stressed, rather than diminished, the responsibility faced by the jury. *Darden*, 477 U.S. at 183 n.15 (noting courts should consider the prosecutor's comments in the context of the facts and circumstances of the entire case when determining whether a prosecutor's argument rendered a trial unfair). The trial court gave repeated instructions to the jury that the arguments of counsel were not evidence or law. And, the comments did not manipulate or misstate the evidence or any facts.[24] *Id.* at 181-82. In any event, the comments did not rise to the "sort of egregious misconduct" that amounts to a denial of constitutional due process, *Donnelly v. DeChristoforo*, 416 U.S. 637, 647

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[24]*Caldwell* also suggests that the truth or falsity of a prosecutor's comments may be an essential factor in determining whether they merit vacating a death sentence. 472 U.S. at 342 (O'Connor, J., concurring in part) ("[T]he prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility."); *see also Romano*, 512 U.S. at 10 (finding capital jury's sense of responsibility was not diminished where jury was presented evidence of defendant's prior death sentence because the evidence did not mislead).

(1974), and they did not have a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Abu-Jamal*, 2001 WL 1609690, at *92 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)). For these reasons, the Pennsylvania Supreme Court's decision was neither contrary to nor an unreasonable application of Supreme Court precedent.

V.

Abu-Jamal contends Judge Sabo, the Court of Common Pleas Judge who presided over both the trial and post-conviction review, was biased against him during PCRA review, which deprived him of his right to due process as guaranteed by the Fifth and Fourteenth Amendments. Abu-Jamal presented this claim to the Pennsylvania Supreme Court on PCRA review, arguing the judge's bias at the post-conviction proceeding required his recusal. The Pennsylvania Supreme Court found no merit to the claim, noting that "the judge's duty to maintain the judicial decorum of the proceedings was, at times, met with great resistance . . . [but u]pon review of the entire record, we cannot conclude that any of Judge Sabo's intemperate remarks were unjustified or indiscriminate nor did they evidence a settled bias against Appellant." *PCRA Appeal Op.*, 720 A.2d at 89-90.

The District Court held Abu-Jamal's judicial bias allegations were not cognizable on state

habeas review because "a viable habeas claim cannot be predicated on petitioner's allegation of error in his PCRA hearing." *Abu-Jamal*, 2001 WL 1609690, at *129. The District Court adopted the reasoning of the majority of courts of appeals that had decided the issue. *Id.* at *128-29, n.96. The District Court also noted it had determined the state court fact-finding "to be reasonable, or, if unreasonable, not the basis of the state court's decision" and that the state courts' denial of this claim was not contrary to or an unreasonable application of federal law. *Id.* at *129, 130.

In granting a certificate of appealability to determine whether Abu-Jamal was denied due process during post-conviction proceedings, we directed the parties to address whether denial of due process resulting from alleged judicial bias during state post-conviction proceedings can be grounds for federal habeas corpus relief. In the meantime, we addressed the issue in another case, holding that alleged errors in collateral proceedings are not a proper basis for habeas relief. *See Lambert v. Blackwell*, 387 F.3d 210, 247 (3d Cir. 2004) ("[H]abeas proceedings are not the appropriate forum . . . to pursue claims of error at the PCRA proceeding . . . . It is the original trial that is the 'main event' for habeas purposes."). As we explained in *Lambert*:

> The federal courts are authorized to provide collateral relief where a

> petitioner is in state custody or under a federal sentence imposed in violation of the Constitution or the laws or treaties of the United States. Thus, the federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the petitioner's collateral proceeding does not enter into the habeas calculation. We have often noted the general proposition that habeas proceedings are 'hybrid actions'; they are 'independent civil dispositions of completed criminal proceedings.' Federal habeas power is 'limited . . . to a determination of whether there has been an improper detention by virtue of the state court judgment.'

Id. (quoting *Hassine v. Zimmerman*, 160 F.3d 941, 954-55 (3d Cir. 1998)) (internal citations omitted). Accordingly, this claim is not a cognizable basis for habeas relief. *Lambert*, 387 F.3d at 247.[25]

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[25]Even though error in state collateral proceedings cannot be grounds for federal habeas relief, the error "may affect the deference we owe the court's findings under §

(continued...)

VI.

The District Court granted relief on Abu-Jamal's claim that the jury instructions and verdict form employed in the sentencing phase of Abu-Jamal's trial were constitutionally defective under *Mills v. Maryland*, 486 U.S. 367 (1988), and *Boyde v. California*, 494 U.S. 370 (1990), and found the Pennsylvania Supreme Court was objectively unreasonable in finding otherwise. The District Court found a "'reasonable likelihood that the jury has applied the . . . instruction [and form] in a way that prevents the consideration of constitutionally relevant evidence' regarding the existence of mitigating circumstances (i.e., those weighing against the imposition of the death penalty)." *Abu-Jamal*, 2001 WL 1609690, at *1 (quoting *Boyde*, 494 U.S. at 380 (alteration in original)). The Commonwealth appealed the District Court's grant of relief on this claim.

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[25](...continued)
2254(d) and 2254(e)(1)." *Lambert*, 387 F.3d at 247. The Pennsylvania Supreme Court concluded that the PCRA proceedings were conducted without error. *PCRA Appeal Op.*, 720 A.2d at 121. Specifically, it held, *inter alia*, that there was an insufficient showing of bias to warrant recusal. *Id.* at 90-91. This decision is not contrary to or an unreasonable application of federal law, nor is it based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d). But, even under a de novo standard, we will affirm.

A.

The Commonwealth contends Abu-Jamal did not exhaust the *Mills* claim as required by 28 U.S.C. § 2254(b)(1)(A), alleging Abu-Jamal only raised the claim in state court as one of ineffective assistance of counsel and based his argument only on the verdict form, not on the court's instructions to the jury. A petitioner seeking relief under § 2254 must exhaust "the remedies available," *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000), by "present[ing] in substance the same claim he is now seeking to have the federal courts review. Even if a state court fails to rule on the merits of a claim, a properly presented claim will be considered exhausted." *Johnson v. Pinchak*, 392 F.3d 551, 556 (3d Cir. 2004) (internal citations omitted); *see also Baldwin v. Reese*, 541 U.S. 27, 33 (2004) ("[A] state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or similar document) that does not alert it to the presence of a federal claim in order to find material . . . that does so.").

The Supreme Court decided *Mills* in 1988, while Abu-Jamal's claim was on direct appeal to the Pennsylvania Supreme Court.[26] Abu-Jamal

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[26]We need not conduct retroactivity analysis under *Teague v. Lane*, 489 U.S. 288 (1989), because Abu-Jamal's conviction did not become final until the United States

(continued...)

first raised the *Mills* claim on PCRA review. The PCRA court found that because Abu-Jamal failed to assert this claim at trial or on direct appeal, "this claim should be waived," and could not form the basis for PCRA relief. *PCRA Op.*, 1995 WL 1315980, at *111. The PCRA court then considered the *Mills* claim on the merits in the alternative but did not find a constitutional violation, concluding that similar verdict forms and instructions had been upheld in *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 306-08 (3d Cir. 1991), and by the Pennsylvania Supreme Court. *Id.* The Pennsylvania Supreme Court, reviewing the PCRA court, noted "[Abu-Jamal] next submits that the penalty phase verdict form was constitutionally defective pursuant to the dictates of *Mills v. Maryland* . . ." and then proceeded to address the *Mills* claim on the merits. *PCRA Appeal Op.*, 720 A.2d at 119. Because Abu-Jamal presented the *Mills* claim to the state courts on the merits, we find this claim exhausted and properly before us for review.

Additionally, the Commonwealth contends that Abu-Jamal's *Mills* claim is procedurally defaulted for purposes of habeas review. "[A] procedural default does not bar consideration of a federal claim on either direct or habeas review

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[26](...continued)
Supreme Court denied his petition for writ of certiorari on October 1, 1990, which was after the Court decided *Mills*. *See id.* at 310.

unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar." *Harris*, 489 U.S. at 263 (internal quotations omitted); *see also Coleman v. Thompson*, 501 U.S. 722, 739 (1991) (noting a claim is not procedurally defaulted if it "fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law"). Our review is foreclosed if the last state court to consider the issue "addresses the merits of the federal claim only in the course of resolving another, independent [ineffective assistance of counsel] claim." *Sistrunk*, 96 F.3d at 675.

Abu-Jamal asserted the *Mills* claim for the first time on collateral review. The PCRA court stated:

> [Abu-Jamal] fails to raise this claim at trial or on direct appeal. Therefore, this claim should be waived. As [Abu-Jamal] has not overcome that procedural bar, the claim is [sic] should be precluded from PCRA review and may not be further considered. 42 Pa. Cons. Stat. § 9543(a)(3). The following discussion of the merits is undertaken in the alternative.

PCRA Op., 1995 WL 1315980, at *111. The PCRA court proceeded to discuss the merits only "in the alternative." *Id.*

On appeal of the denial of state collateral relief (PCRA) Abu-Jamal challenged the previous *Mills* rulings on ineffective assistance of counsel grounds as well as on the merits. Upon review of the PCRA court's decision, the Pennsylvania Supreme Court addressed the *Mills* claim on the merits. The court did not clearly state it was addressing the merits of the *Mills* claim as a component of an ineffective assistance of counsel claim nor did it expressly find the claim waived. The court's discussion of waiver, relegated to a footnote at the beginning of its opinion, *see PCRA Appeal Op.*, 720 A.2d at 88 n.9, is insufficient to bar our review. The court did not enumerate which claims, if any, it would address only as ineffective assistance claims. Without a clear and express statement that the state court disposed of this specific claim on independent state procedural grounds, we cannot find the claim procedurally defaulted.[27]

On the merits, the Commonwealth contends our review is limited to an assessment of the verdict form. The Commonwealth maintains Abu-Jamal only raised a *Mills* claim based on the structure of the verdict form and did not fairly

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[27]As noted, the Pennsylvania Supreme Court applied a relaxed waiver rule to all issues arising in a death penalty case. Since a strict waiver rule was not firmly established and regularly followed, state law procedural grounds are not an adequate basis to support the judgment and cannot be a ground for procedural default.

present an allegation of *Mills* error based on the jury instructions. But in his briefs to both the PCRA court and the Pennsylvania Supreme Court on PCRA review, Abu-Jamal raised allegations of *Mills* error grounded in both the verdict form and the trial court's jury instruction.[28] In his brief to the Pennsylvania Supreme Court on PCRA review, Abu-Jamal focused his argument on the structure of the verdict form, but he cited *Mills* for the proposition that the combined effect of the jury instructions and the verdict form may result in constitutional error, arguing, "[n]othing in the court's instructions would have corrected the jury's probable misunderstanding based on the form. The Court must follow *Mills* and vacate the death sentence." The PCRA court addressed both the jury instructions and the verdict form, noting "[t]he constitutionality of similar verdict forms, along with the instructions given here, has repeatedly been upheld." *PCRA Op.*, 1995 WL 1315980, at *111. Even though the Pennsylvania Supreme Court in its *Mills* analysis on PCRA review only considered the verdict form, we find Abu-Jamal raised a *Mills* claim based on both the verdict form and the jury instructions. Therefore, we will not consider either in isolation.

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[28]As noted, Abu-Jamal did not raise a *Mills* claim at trial or on direct review to the Pennsylvania Supreme Court, but he first raised it on PCRA review.

Our review is limited to whether the Pennsylvania Supreme Court unreasonably applied *Mills*. *See* 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 405. The Pennsylvania Supreme Court correctly identified the applicable Supreme Court precedent, *Mills*, and the facts here are not "materially indistinguishable" from the facts in *Mills*. *See Williams*, 529 U.S. at 406.[29] Accordingly, the Pennsylvania Supreme Court's conclusion was not "contrary to" *Mills*, and we need only determine whether the court's conclusion was "objectively unreasonable." 28 U.S.C. § 2254(d).

B.

Abu-Jamal contends the verdict form unconstitutionally precluded members of the jury from considering a particular mitigating circumstance unless there was unanimous agreement as to its proof. Abu-Jamal maintains the jury instructions compounded this error. The Commonwealth contends the Pennsylvania Supreme Court's decision did not unreasonably apply Supreme Court precedent under the AEDPA standard of review, citing *Zettlemoyer*. The Pennsylvania Supreme Court affirmed the PCRA court's denial of post-conviction relief on the *Mills* claim. *PCRA Appeal Op.*, 720

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[29]Of course, if the facts were materially indistinguishable then the Pennsylvania Supreme Court's conclusion would be "contrary to" *Mills*.

A.2d at 119. We must determine whether the Pennsylvania Supreme Court decision was unreasonable in light of *Mills* and *Boyde*.

In Mills, the Supreme Court vacated a death sentence after finding there was a "substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Mills*, 486 U.S. at 384. In capital cases, a juror must "be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." *McKoy v. North Carolina*, 494 U.S. 433, 442-43 (1990); *see also Mills*, 486 U.S. at 374-75; *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

The petitioner in *Mills* challenged Maryland's capital sentencing statute, as applied to him, contending a reasonable juror could have understood the verdict form and the judge's instructions to require jury unanimity on any mitigating circumstances. The Court considered an "intuitively disturbing" hypothetical situation:

> All 12 jurors might agree that some mitigating circumstances were

> present, and even that those mitigating circumstances were significant enough to outweigh any aggravating circumstance found to exist. But unless all 12 could agree that the same mitigating circumstance was present, they would never be permitted to engage in the weighing process or any deliberation on the appropriateness of the death penalty.

Mills, 486 U.S. at 374. The Court concluded that even though a constitutional construction of Maryland's sentencing scheme was possible, reasonable jurors could have interpreted the verdict form and judge's instructions to preclude consideration of mitigating circumstances if not found unanimously. Accordingly, the Court vacated Mills's sentence because "[t]he possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk." *Id.* at 384.

In *Mills*, the Court posed "[t]he critical question . . . whether petitioner's interpretation of the sentencing process is one a reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case." *Id.* at 375-76. In *Boyde v. California*, 494 U.S. 370 (1990), the Supreme Court clarified the legal standard as "whether there is a reasonable likelihood that the jury has applied the challenged

instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380. The District Court found the Pennsylvania Supreme Court's determination unreasonable. We agree.

Turning to this case, we examine the verdict form used at trial. The first page of the three-page verdict form stated, in part:

> (1) We, the jury, unanimously sentence the defendant to
>
> [X] death
>
> [ ] life imprisonment.
>
> (2) (To be used only if the a foresaid sentence is death)
>
> We, the jury, have found unanimously
>
> [ ] at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance(s) is/are _____ _____.
>
> [X] one or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstance(s) is/are _____A_____.
>
> The mitigating circumstance(s) is/are _____A_____.

The second page of the verdict form listed the possible aggravating circumstances and the third page

listed the possible mitigating circumstances, each with a designated space for the jury to check those aggravating or mitigating circumstances found. Neither the second nor the third page had additional instructions. At the bottom of the third page, the jurors signed their names and dated the form.

The jury charge here recited, in part:

> Members of the jury, you must now decide whether the defendant is to be sentenced to death or life imprisonment. The sentence will depend upon your findings concerning aggravating and mitigating circumstances. The Crimes Code provides that a verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances.
>
> The verdict must be a sentence of life imprisonment in all other cases . . . . The Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances, but only

by a preponderance of the evidence. This is a lesser burden of proof than beyond a reasonable doubt. A preponderance of the evidence exists where one side is more believable than the other side . . . .

Now, the verdict is for you, members of the jury. Remember and consider all of the evidence giving it the weight to which it is entitled. Remember that you are not merely recommending a punishment. The verdict you return will actually fix the punishment at death or life imprisonment. Remember again that your verdict must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be the verdict of each and everyone [sic] of you.

Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances. Or, if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment.

The court then read the verdict form to the jury.

The Pennsylvania Supreme Court on PCRA review found there was no *Mills* violation. *PCRA Appeal Op.*, 720 A.2d at 119. It reached this conclusion without evaluating whether there was a reasonable likelihood that the jury could have misinterpreted the entire scheme employed at the sentencing phase, that is, the structure and substance of the verdict form together with the oral instructions from the judge. As noted, the Pennsylvania Supreme Court did not consider the judge's jury instructions. Instead, the court focused and relied on the verdict form in finding no merit to the *Mills* claim. *Id.* In its opinion, the Pennsylvania Supreme Court only addressed the verdict form, stating:

> The verdict slip employed in the instant case consisted of three pages. The requirement of unanimity is found only at page one in the section wherein the jury is to indicate its sentence. The second page of the form lists all the statutorily enumerated aggravating circumstances and includes next to each such circumstance a designated space for the jury to mark those circumstances found. The section where the jury is to checkmark those mitigating circumstances found, appears at page three and includes no reference

> to a finding of unanimity. Indeed, there are no printed instructions whatsoever on either page two or page three.

Id. In addition, the court found that the jurors' signatures on the third page was "of no moment since those signature lines naturally appear at the conclusion of the form and have no explicit correlation to the checklist of mitigating circumstances." *Id.* The court then held it could not conclude "that the structure of the form could lead the jurors to believe that they must unanimously agree on mitigating evidence before such could be considered." *Id.* In reaching its conclusion, the Pennsylvania Supreme Court noted it had upheld similar verdict forms against a *Mills* challenge. *Id.*

The District Court found the Pennsylvania Supreme Court's decision was objectively unreasonable under *Mills* and *Boyde*. *Abu-Jamal*, 2001 WL 1609690, at *126. The court relied upon several factors to reach this conclusion, including the Pennsylvania Supreme Court's failure to address "the consequence of the jury instructions in this case, much less to reach a reasonable conclusion regarding the effect of the *Jamal* charge, and [it] compounded this error by unreasonably failing to perceive the probable impact of the verdict form on the jury's impression regarding the need for

unanimity."[30] *Id.* The court concluded the verdict form and jury instructions "created a reasonable likelihood that the jury believed that it was precluded from considering a mitigating circumstance that had not been found unanimously to exist." *Id.*

We agree the Pennsylvania Supreme Court's failure to address the entire sentencing scheme resulted in an incomplete and unreasonable application of *Mills* and *Boyde*. It was unreasonable for the Pennsylvania Supreme Court to reach its conclusion that the "structure of the form," *PCRA Appeal Op.*, 720 A.2d at 119, could not lead to juror confusion based on only a portion of the form, rather than the entire form, and without evaluating whether there was a reasonable likelihood of jury confusion based on an interpretation of the judge's jury instructions and the entire verdict form together.

The verdict form's first page, especially the language that stated "we, the jury, have found unanimously . . . one or more aggravating circumstances which outweigh any mitigating circumstances," reads that both aggravating and mitigating circumstances must be found unanimously. There is nothing in the verdict form to clarify that

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[30]The District Court also relied upon *Banks v. Horn*, 271 F.3d 527, 547-48 (3d Cir. 2001), which subsequently was reversed on other grounds, *see Beard v. Banks*, 542 U.S. 406 (2004).

the jury should apply the unanimity requirement to aggravating circumstances, but not to mitigating circumstances. *See Mills,* 486 U.S. at 378-79 (recognizing absence of an explicit instruction to jury indicating how jury should behave if some, but not all, find a mitigating circumstance to apply to the defendant). The Pennsylvania Supreme Court did not evaluate whether this language would create a reasonable likelihood the jury had applied the form in violation of *Mills*. Furthermore, the jury instructions risked jury confusion about a unanimity requirement for both aggravating and mitigating circumstances. Throughout the jury instructions, the court repeatedly emphasized unanimity in close relation to its discussion of mitigating circumstances. The jury charge stated: "The Crimes Code provides that a verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances." The trial court reinforced the impression that unanimity had to be found for both aggravating and mitigating circumstances by stating, "remember again that your verdict must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be the verdict of each and every one of you." The judge's charge did not instruct the jury to distinguish between mitigating and aggravating circumstances in their application of the unanimity requirement. This absence is notable because the

trial court distinguished between the burdens of proof the jury should apply to mitigating and aggravating circumstances. The risk of confusion is higher where the court distinguishes between aggravating and mitigating circumstances on one ground, but not on any other. For these reasons, we conclude that the verdict form together with the jury instructions were misleading as to whether unanimity was required in consideration of mitigating circumstances.

We have examined similar instructions in previous cases and found *Mills* violations. *See Albrecht*, 485 F.3d at 119-120 (finding a *Mills* violation, but vacating the District Court's order granting habeas relief after applying *Teague*); *Banks*, 271 F.3d at 547-48 (granting a writ of habeas corpus, after applying AEDPA standard of review, because jury instruction and verdict form caused *Mills* error), *rev'd on other grounds by Beard v. Banks*, 542 U.S. 406 (2004); *Frey v. Fulcomer*, 132 F.3d 916, 923-24 (3d Cir. 1997) ("concluding that the charge in this case was ambiguous, reasonably likely to confuse the jury, and thus in error" under *Mills*, without applying AEDPA standard of review). The Commonwealth contends the Pennsylvania Supreme Court could not have been unreasonable because we found no *Mills* violation in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991). *See id.* at 307-08 (finding no *Mills* violation where the instructions had a seventeen word separation between the unanimity clause

and the mitigating circumstances clause). But *Zettlemoyer* is in tension with *Frey* and we will not engage in a sentence-level parsing of the language employed. Our analysis relies on United States Supreme Court precedent in finding a *Mills* violation.

We conclude the Pennsylvania Supreme Court's decision was objectively unreasonable under the dictates of *Mills* and *Boyde*. The jury instructions and the verdict form created a reasonable likelihood that the jury believed it was precluded from finding a mitigating circumstance that had not been unanimously agreed upon. Accordingly, we will affirm the District Court's grant of relief on this claim.

VII.

For the foregoing reasons, we will affirm the District Court's judgment, which granted a writ of habeas corpus as to the *Mills* sentencing phase claim, but denied the petition for the balance of the claims asserted. As the District Court noted, the "Commonwealth of Pennsylvania may conduct a new sentencing hearing in a manner consistent with this opinion within 180 days of the Order accompanying this [opinion], during which period the execution of the writ of habeas corpus will be stayed, or shall sentence [Abu-Jamal] to life imprisonment." *Abu-Jamal*, 2001 WL 1609690, at *130.

AMBRO, *Circuit Judge*, concurring in part and dissenting in part:

Excluding even a single person from a jury because of race violates the Equal Protection Clause of our Constitution. *See Batson v. Kentucky*, 476 U.S. 79, 84-86, 99 n.22 (1986). This simple justice principle was reaffirmed by our Supreme Court this past week. *Snyder v. Louisiana*, No. 06-10119, 2008 WL 723750, at *4 (Mar. 19, 2008).

The Supreme Court in *Batson* acknowledged how important this principle is by replacing the standard it set out but two decades before in *Swain v. Alabama*, 380 U.S. 202 (1965). *Swain* required a defendant to show proof of racially discriminatory peremptory challenges over a *series of cases*; after *Batson*, a defendant may "make a prima facie showing of purposeful racial discrimination in the selection of the venire by relying solely on the facts concerning . . . *his case*." *Batson*, 476 U.S. at 95 (emphasis in original). In so holding, the Court made no statement that a defendant forfeited his right to a fair jury trial of his peers if he failed to object to a prosecutor's racially discriminatory use of peremptory strikes in jury selection during the selection itself. Nor did it impose an onerous burden on a defendant to set in motion *Batson*'s burden-shifting framework by making a *prima facie* case.

Against this backdrop, I cannot agree with the imposition by my colleagues in the majority of a contemporaneous objection requirement for violations of equal protection in jury selection. They nevertheless reach the merits despite this procedural ruling, and I do not agree with them that Mumia Abu-Jamal fails to meet the low bar for making a *prima facie* case under *Batson*. In holding otherwise, they raise the standard necessary to make out a *prima facie* case beyond what *Batson* calls for. A *prima facie* case, the first step in the three-step *Batson* analysis, does not mean a defendant prevails. It does mean that he is permitted to proceed to the next step. Because we do not so proceed when I believe we should, I respectfully dissent as to these issues.[31]

I. Contemporaneous Objection Rule

I address first this case's newly created contemporaneous objection rule for *habeas* petitions. This rule imposes, as a prerequisite to the federal claim, the requirement that a defendant make a

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[31]I agree with my colleagues on all other issues save Section VI.B of the majority opinion. There I concur in the judgment that a violation of *Mills v. Maryland*, 486 U.S. 367 (1988), has occurred in sentencing. Among other reasons, that outcome follows our controlling precedents in *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), and *Banks v. Horn*, 271 F.3d 527 (3d Cir. 2001), *rev'd on other grounds*, 536 U.S. 266 (2002).

"timely"[32] objection to the prosecutor's racially based use of peremptory challenges. It goes against the grain of our prior actions, as our Court has addressed *Batson* challenges on the merits without requiring that an objection be made during jury selection in order to preserve *habeas* review.

A. Should Our Court Require a Contemporaneous Objection in a State-Court Trial as a Prerequisite to a Federal *Batson* Claim?

As my colleagues concede, Abu-Jamal's failure to lodge an objection to the exclusion of black potential jurors contemporaneous to that event would not result in a state procedural bar[33] because the Pennsylvania Courts (with the federal District Court following suit) considered Abu-Jamal's *Batson* claim on its merits. But in this case our Court imposes a federal contemporaneous objection requirement – as a prerequisite for a *Batson*

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[32]My colleagues, regrettably, do not define what in their opinion is a "timely" objection for the purpose of preserving a *Batson* claim.

[33]It is well-established that a federal court will not consider "'a question of federal law decided by a state court if the decision of that [state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)).

claim – in addition to any potential state procedural bar. I do not agree with such a requirement, and I do not believe that Abu-Jamal forfeited his right to present a *Batson* claim by failing to lodge an objection before trial.

No doubt an objection made at the time of a prosecutor's constitutionally infirm use of a peremptory challenge is most apt to ensure that *Batson* issues are addressed expediently and efficiently. The trial judge can best set the right remedy quickly, such as "discharg[ing] the venire and select[ing] a new jury from a panel not previously associated with the case or . . . disallow[ing] the discriminatory challenges and resur [ing] selection with the improperly challenged jurors reinstated on the venire." *Batson*, 476 U.S. at 99 n.24 (citations omitted). After the jury is seated and the trial proceeds, the ante escalates; if we determine that the prosecution exercised its peremptory challenges in violation of *Batson*, "our precedents require that [a] petitioner's conviction be reversed." *Id.* at 100.

That a contemporaneous objection is helpful in the context of *Batson* does not mean, however, that it is constitutionally called for. The Supreme Court has never announced a rule requiring a contemporaneous objection as a matter of federal constitutional law, and I see no reason for us to do so now. The Court, in leaving the implementation of the *Batson* decision to the trial courts, stated

that "[w]e decline . . . to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Id.* at 99. My colleagues believe this demonstrates that the Supreme Court "'envisioned an objection raised during the jury selection process'" prior to trial. *See Maj. Op.* 18-19 (quoting *McCrory v. Henderson*, 82 F.3d 1243, 1247 (2d Cir. 1996)). What they overlook is that, even if the Supreme Court "envisioned" an objection, it authorized the states to craft rules for it as a matter of state procedural law.[34] Thus, I read this sentence from *Batson* as emphasizing that the Court trusts the state courts to fashion their own protocol and will not "formulate particular procedures to be followed," including the procedures governing the timeliness of an objection. *See Batson*, 476 U.S. at 99.

And that is as it should be. As stated above, the trial court has significantly more options to address a *Batson* violation when it is discerned during jury selection. But nowhere in the Supreme Court's grant of discretion to trial courts is the pronouncement that, where a contemporaneous

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[34]This view is confirmed by the Supreme Court's opinion in *Ford v. Georgia*, where it noted that "[i]n Batson . . . we . . . declined . . . to decide when an objection must be made to be timely. Instead, we recognized that local practices would indicate the proper deadlines . . . ." 498 U.S. 411, 423 (1991) (citation omitted). For further discussion of *Ford*, *see infra* Part I.B.

objection is not made and the state courts nonetheless consider the *Batson* claim on the merits, a federal court will subsequently be barred from reviewing the merits of a petitioner's claim that the prosecution's use of a peremptory challenge violated the Constitution. Our Court today makes that pronouncement.

B. Subsequent Supreme Court Caselaw on Contemporaneous Objections in *Batson* Cases: *Ford v. Georgia*

Since *Batson*, the Supreme Court still has not indicated that a contemporaneous objection is a prerequisite to a federal *Batson* claim. To the contrary, in *Ford v. Georgia*, 498 U.S. 411 (1991),[35] the

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[35] *Ford* concerned the adequacy of a new state procedural rule that required *Batson* claims to be raised after the jury was selected but before jurors were sworn. Ford had made his objection before, but not at, jury selection, and the State of Georgia argued that it was therefore untimely under the rule. *Ford*, 498 U.S. at 419, 421. The Supreme Court had to decide whether Georgia's rule – created after Ford's trial – operated as an independent and adequate state ground to preclude federal consideration of Ford's *Batson* claim on the merits. It held that, as a general matter, "[u]ndoubtedly . . . a state court may adopt a general rule that a *Batson* claim is untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its members are selected." *Id.* at 423. However, the Court went on to determine that Georgia's procedural rule was not an "adequate and independent state procedural bar" because it had

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[35](...continued)
not been developed until after Ford's trial. *Id.* at 424. To apply it retroactively, the Court reasoned, "would therefore apply a rule unannounced at the time of petitioner's trial and consequently inadequate to serve as an independent state ground." *Id.*

Interestingly, it is at least arguable that Abu-Jamal presented an objection before trial in much the same way that Ford did. On March 18, 1982, before jury selection or trial had started, Abu-Jamal filed a pretrial motion seeking to distribute questionnaires to the potential members of his jury venire pool in an effort to ensure that he was tried by "a fair and impartial jury." Transcript of March 18, 1982, at 11-13. At the motion hearing, the following colloquy took place between Abu-Jamal's counsel and the Court:

> [Defense counsel:] We – as Your Honor well knows – we have twenty peremptory challenges in a criminal case. It has been the custom and the tradition of the District Attorney's Office to strike each and every black juror that comes up peremptorily. It has been my experience since I have been practicing law, as well as the experience of the defense bar, . . . that that occurs.
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> . . . .
>
> The Court: The district attorney says he does not agree with that statement.
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> . . . .
>
> [Defense counsel:] . . . I am not saying, Your Honor, that that questionnaire or any other procedure that Your Honor might approve would in fact insure any black representation

(continued...)

Court reaffirmed "[t]he appropriateness in general of looking to local rules for the law governing the timeliness of a constitutional claim." *Id.* at 423. It continued:

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[35](...continued)
on the jury. What I am saying is that even if it's an all white jury, Your Honor, I want to be certain that it's a fair and impartial jury.

Id. at 12-13.

The District Court did not acknowledge this portion of the record. *See Abu-Jamal v. Horn*, No. 99-5089, 2001 WL 1609690, at *105 (E.D. Pa. Dec. 18, 2001). My colleagues mention it in a footnote and discount it on the basis that "Abu-Jamal's motion to distribute a questionnaire to all prospective jurors is different from lodging a timely objection during the jury selection process." Maj. Op. 27 n.10. However, this colloquy served to put the trial court on notice that the prosecutor might use peremptory challenges in a discriminatory fashion. Defense counsel framed the issue in a manner consistent with the then-prevailing *Swain* standard, which required a defendant to demonstrate that a prosecutor repeatedly struck blacks over a number of cases to make out a claim for an equal protection violation in the prosecutorial use of peremptory strikes. *See Swain*, 380 U.S. at 223-24. If my colleagues are driven to create a contemporaneous objection rule because it "alert[s] the [trial] judge to errors that might be corrected in the first instance and give[s] the judge the opportunity to develop a complete record of the jury selection process for appellate review," Maj. Op. 23, it is reasonable that they should inquire whether the above colloquy could have served to put the trial judge on adequate notice. They do not do so, and thus this inquiry fails for lack of a second vote.

> In *Batson* itself, for example, we imposed no new procedural rules and declined either "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges," or to decide when an objection must be made to be timely. Instead, we recognized that local practices would indicate the proper deadlines in the contexts of the various procedures used to try criminal cases, and we left it to the trial courts, with their wide "variety of jury selection practices," to implement *Batson* in the first instance.

Id. (citations omitted). The Court was explicit in stating that the issue of "when an objection must be made to be timely" is a matter of "local practice[]" rather than federal law. Moreover, it never indicated that, as a matter of federal law, a "general rule" of timeliness existed. Thus, the presence or absence of a contemporaneous objection is purely an issue of state procedural law. If a state court rejects a defendant's *Batson* claim as a matter of state law because it was not made within the timeframe specified by the state's procedural rules, and the federal court determines that the state rule functions as an independent and adequate basis for decision, then the federal court will be procedurally barred from hearing the claim. *See supra* n.33; *cf. Cabrera v. Barbo*, 175 F.3d 307, 312-13 (3d Cir.

1997). However, where the state does not require such an objection – or, as here, where the Commonwealth's relaxed waiver rule is not capable of serving as an independent and adequate state law procedural bar – the federal court should proceed to the merits of the *Batson* claim.

My colleagues respond that the Court's analysis of Georgia's state procedural rule in *Ford* is not directly controlling on whether there is a parallel federal rule. To be sure, it would be helpful if the Supreme Court had explicitly renounced the existence of a federal contemporaneous objection rule. Yet it cannot be ignored that the Court in *Ford* implicitly relied on the non-existence of such a federal analog. It determined that Georgia's procedural rule about the timing of a *Batson* objection did not bar consideration of the issue in federal court. If a federal contemporaneous objection rule did exist as an independent bar, one would expect the Court to have considered next whether Ford had satisfied that rule.

C. Caselaw of Our Court

Our Court has previously reached the merits of *Batson* claims on *habeas* review in cases where the petitioner did not make a timely objection during jury selection – signaling that our Circuit does not have a federal contemporaneous objection rule – and I see no reason why we should not afford Abu-Jamal the courtesy of our precedents. *See,*

e.g., Wilson v. Beard, 426 F.3d 653, 659 (3d Cir. 2005); *Hardcastle v. Horn*, 368 F.3d 246, 251 (3d Cir. 2004); *Riley v. Taylor*, 277 F.3d 261, 273 (3d Cir. 2001) (*en banc*).[36]

In *Wilson*, the defendant never made a *Batson* objection pre-trial, during trial, or even in his first post-conviction collateral proceeding. After the release of a videotape detailing the Philadelphia District Attorney's suggestions on how to keep blacks off juries,[37] Wilson filed a

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[36]In creating the contemporaneous objection requirement, my colleagues cite cases from other Courts of Appeals that treat the failure to lodge a contemporaneous objection as a constitutional bar to and/or waiver of the claim. *See, e.g., McCrory*, 82 F.3d at 1249 ("[W]e hold that the failure to object to the discriminatory use of peremptory challenges prior to the conclusion of jury selection waives the objection."); *Wilkerson v. Collins*, 950 F.2d 1054, 1063 (5th Cir. 1992) ("[The] failure to timely object at trial is a constitutional bar to [a] *Batson* challenge."). These cases, of course; are not binding precedent on our Court. To the contrary, our previous cases have reached the merits of *Batson* claims despite the absence of a contemporaneous objection.

[37]As explained in *Wilson*, the facts surrounding the videotape are as follows:

> In 1997, Jack McMahon, the Assistant District Attorney who prosecuted Wilson's first case, won the Republican nomination to challenge incumbent District Attorney Lynne Abraham. On March 31, 1997, eleven days

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[37](...continued)
after the primary election, Abraham released a videotape from the late 1980s which showed McMahon giving a training session on jury selection to other prosecutors in the District Attorney's Office. In the tape, McMahon makes a number of highly inflammatory comments implying that he regularly seeks to keep qualified African-Americans from serving on juries. Since these comments are central to [Wilson's] appeal, we will quote from them at length.

McMahon began his presentation by reviewing the procedures followed by Pennsylvania courts in selecting juries. He then proceeded to discuss his views of the goals a prosecutor should have in mind in selecting a jury:

> The case law says that the object of getting a jury is to get – I wrote it down. I looked in the cases. I had to look this up because I didn't know this was the purpose of a jury. "Voir dire is to get a competent, fair, and impartial jury." Well, that's ridiculous. You're not trying to get that. You're – both sides are trying to get the jury most likely to do whatever they want them to do.
>
> And if you go in there and any one of you think you're going to be some noble civil libertarian and try to get jurors, "Well, he says he can be fair; I'll go with him," that's ridiculous. You'll lose and you'll be out of the office; you'll be doing corporate law.

(continued...)

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[37](...continued)
McMahon went on to discuss certain categories of people that he believed did not make good jurors. At various times in the tape, he told the assembled prosecutors to avoid "smart people," law students and lawyers, social workers, "very esoteric people," teachers, and "intelligent doctors." But the group he discussed most was African-Americans:

> And that is – and, let's face it, again, there's [sic] the blacks from the low-income areas are less likely to convict. It's just – I understand it. It's [an] understandable proposition. There is a resentment for law enforcement, there's a resentment for authority, and, as a result, you don't want those people on your jury. And it may appear as if you're being racist or whatnot, but, again, you are just being realistic. You're just trying to win the case.

McMahon told his audience that, while many types of blacks were poor jurors, certain blacks could be prosecution-friendly:

> Another factor – I'll tell you, if – you know, in selecting blacks, again, you don't want the real educated ones, again. This goes across the board of all races; you don't want smart people. And, again, but if you're sitting down and you're going to take blacks, you want older blacks. You want older black men and women, particularly men. Older black men are very good. Guys 70, 75 years old are very good jurors, generally speaking. . . .

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> Older black women, on the other hand, when you have like a black defendant who's a young boy and they can identify as his, you know – motherly type thing, are a little bit more different. . . .
>
> The other thing is blacks from the South, excellent. . . .

In particular, he advised his audience to avoid [younger] black women:

> [I]n my experience, black women, young black women[ ]are very bad. There's an antagonism. I guess maybe because they're downtrodden on two respects, they got two minorities, they're women and they're . . . blacks, so they're downtrodden in two areas. . . . And so younger black women are difficult, I've found.
>
> . . . .

In order to maintain the proper racial composition, McMahon advised his audience to record the race of potential jurors:

> Another thing to do . . . when a jury comes in the room, . . . count them. Count the blacks and whites. You want to know at every point in that case where you are. . . . You don't want to look there or go, "Is there a black back there? Wait a minute. Are you a black guy?"

McMahon then proceeded to end his presentation, ironically, with a brief discussion of the Supreme Court's decision in *Batson*:

(continued...)

[37](...continued)
One other – now, I'm sure you're all familiar, if we talk about the case law – I generally don't talk much about case law, but the new case is Batson versus Kentucky. I'm sure you've all become aware of that case. . . .

But in the future we're going to have to be aware of this case, and the best way to avoid any problems with it is to protect yourself. And my advice would be in that situation is when you do have a black jury, you question them at length. And on this little sheet that you have, mark something down that you can articulate [at a] later time if something happens, because if they – because the way the case is stated, that it's only after a prima facie showing that you're doing this that it becomes – that the trial judge can then order you to then start showing why you're striking them not on [a] racial basis.

So if – let's say you strike three blacks to start with, the first three people. And then it's like the defense attorney makes an objection saying that you're striking blacks. Well, you're not going to be able to go back and say, oh – and make something up about why you did it. Write it down right then and there.

. . . So sometimes under that line you may want to ask more questions of those people so it gives you more ammunition to make an articulable reason as to why you are

(continued...)

second post-conviction petition raising a *Batson* claim, *Wilson*, 426 F.3d at 658, and we reviewed it on the merits, *id.* at 666-70. If a contemporaneous objection were required as a prerequisite to the federal claim, we could not have proceeded to the merits of Wilson's claim.

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[37](...continued)
striking them, not for race. So that's how to pick a jury.

Wilson, 426 F.3d at 656-58.

The videotape is noteworthy because it prompted Wilson to raise his *Batson* claim despite the absence of a contemporaneous objection. But it is further significant because it gives a view of the culture of the Philadelphia District Attorney's Office in the 1980s.

The District Court in Abu-Jamal's case found the tape to be "irrelevant" because it was produced five years after his trial and because he was prosecuted by someone other than McMahon. *Abu-Jamal*, 2001 WL 1609690, at *109. However, I find it difficult to believe that the culture in the Philadelphia D.A.'s Office was any better five years before the training video was made. Indeed, given that Abu-Jamal's trial preceded *Batson*, it is not far-fetched to argue that the culture of discrimination was even worse. Moreover, to the extent that this video was of a training session in the D.A.'s Office – a training session, apparently, on how to deal with the Supreme Court's pronouncement in *Batson* – the obvious question is whether the sentiments expressed were limited specifically to one prosecutor or whether they existed throughout the office.

Next, in *Hardcastle* the prosecutor had twenty available peremptory challenges, which she used to remove twelve of the fourteen black members of the jury venire. 368 F.3d at 251. The result was a jury that had only one black member. *Id.* Hardcastle's attorney did not object to the prosecutor's use of peremptory challenges during jury selection, but did subsequently move for a mistrial after *voir dire* – a motion that was denied.[38] *Id.* On *habeas* review, we entertained the merits of Hardcastle's *Batson* claim without considering whether *Batson* required a contemporaneous objection to be made during jury selection.

Finally, in *Riley* the defendant was convicted by an all-white jury, and his counsel made no *Batson* objection at the time of jury selection. 277 F.3d at 271-72, 274. When Riley raised a *Batson* claim in his *habeas* petition, the District Court held that

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[38]In their discussion of the motion for a mistrial in *Hardcastle*, my colleagues appear to intimate that such a motion could suffice as a timely objection under their newly created contemporaneous objection rule. Maj. Op. 17 n.3. Given their belief that the Court in *Batson* "envisioned an objection raised during the jury selection process," Maj. Op. 18-19 (internal quotation marks omitted), I fail to see how they could construe Hardcastle's motion – made after *voir dire* was completed and the jury was empaneled, but prior to trial – as satisfying their objection requirement. Thus, not only is our Court now imposing an additional limitation on a criminal defendant's ability to raise a *Batson* claim, it is declining to set out the parameters of that new rule.

it was procedurally defaulted because it was never presented to the trial court. *Id.* at 274. When our Court considered the issue *en banc*, we held that the claim was not procedurally barred because the last state court to consider the claim did so on the merits. *Id.* at 274-75.

Our caselaw repeats to become a simple refrain: *If a contemporaneous objection were required as a prerequisite to a federal Batson claim, we could not have reached the issue on the merits.*[39] Why we pick this case to depart from that reasoning I do not know. Accordingly, assuming that Abu-Jamal did not raise a timely objection, that would not be fatal to his federal *Batson* claim unless he violated a Pennsylvania state procedural rule that served as an independent and adequate state ground to preclude federal review.

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[39]My colleagues cite one case in which we held on direct appeal that a petitioner had waived his *Batson* claim by failing to make a contemporaneous objection. *See Gov't of the Virgin Islands v. Forte*, 806 F.2d 73, 75 (3d Cir. 1986); Maj. Op. 17. But *Forte* involved the direct appeal of a federal criminal conviction, and thus our waiver analysis was based on the operation of a Federal Rule of Criminal Procedure. As such, *Forte* has no bearing on our analysis of whether Abu-Jamal was required to make a contemporaneous *Batson* objection in the state-court trial to preserve federal *habeas* consideration of his claim.

D. The Failure to Object Contemporaneously to a *Batson* Violation Is a Matter of State Procedural Law

Rather than looking at this as a matter of federal constitutional law, we should treat the failure to lodge a contemporaneous objection as one of state procedural law. This approach accords with both *Batson*, in which the Supreme Court emphasized that trial courts were in the best position to address *Batson*'s implementation, 476 U.S. at 99 n.24, and *Ford*, in which the Court noted that it was appropriate to "look[] to local rules for the law governing the timeliness of a constitutional claim." 498 U.S. at 423. As I believe the presence or absence of a contemporaneous objection is an issue of state-law procedure and not a matter of federal constitutional law, I next consider whether Abu-Jamal procedurally defaulted under Pennsylvania law.

The United States Supreme Court has been unequivocal on the issue of procedural default: "If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available." *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991). Here, the Pennsylvania Supreme Court considered the merits on both direct appeal and state collateral review under the Pennsylvania Post-Conviction Relief Act (PCRA). *Commonwealth v. Abu-Jamal*, 555 A.2d 846,

849-850 (Pa. 1989) (explaining that the Pennsylvania Courts often applied a relaxed waiver rule in capital cases, and then reaching the merits of Abu-Jamal's *Batson* claim); *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 114 (Pa. 1998) (reaching the merits of Abu-Jamal's *Batson* claim).

My colleagues recognize this. *See* Maj. Op. 29-35. The District Court also recognized this and found no bar to federal consideration of the *Batson* claim on the merits. *Abu-Jamal*, 2001 WL 1609690, at *104 ("Moreover, [the *Batson* claim] was adjudicated on the merits by the state courts.").

Curiously, as to the issue of procedural default here, my colleagues and I agree. *See* Maj. Op. 35. ("Without a clear and express statement that the state court denied relief on independent state procedural grounds, we cannot find the claim procedurally defaulted."). I query then why they would choose to come out now with a federal standard when that was not the law heretofore in our Circuit.

Because until now there has been no federal contemporaneous objection rule in our Circuit (in fact, our practice to date has been not to impose such a rule) and Abu-Jamal's claim is not procedur-

ally barred under state law, I turn to the merits of his *Batson* claim.[40]

II. Prima Facie Case

When evaluating Abu-Jamal's *Batson* claim on the merits, both the Pennsylvania Courts on appeal and post-conviction relief review, and the District Court on *habeas* review, erroneously denied the claim based on what I believe is an incorrect analysis of the legal standards governing when a *prima facie* case is made.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), which governs our review of *habeas* cases, we must review the Pennsylvania Supreme Court's ruling on Abu-Jamal's *Batson* claim to determine whether it was "contrary to" or an "unreasonable application of" clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1); *see also Schriro v. Landrigan*, 127 S. Ct. 1933, 1939 (2007). A state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially

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[40]As noted, I find it curious that, while my colleagues "believe a timely objection is required to preserve [the *Batson*] issue on appeal," Maj. Op. 28-29, they nevertheless continue on to the merits of Abu-Jamal's *Batson* claim.

indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A ruling fails under the "unreasonable application" prong where

> the court identifies the correct governing rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular case or if the state court either unreasonably extends a legal principle from the Supreme Court's precedent to a new context where it should not apply or unreasonably refuses to extend the principle to a new context where it should apply.

Rico v. Leftridge-Byrd, 340 F.3d 178, 181 (3d Cir. 2003) (quoting *Gattis v. Snyder*, 278 F.3d 222, 234 (3d Cir. 2002)). The state court's application must be "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003). While decisions of the lower federal courts are not binding precedent for state supreme courts under AEDPA, their decisions may prove instructive in discerning what is "reasonable," especially where "the governing Supreme Court precedent articulates a broad principle that applies to a wide variety of factual patterns." *Ouber v. Guarino*, 293 F.3d 19, 26 (1st Cir. 2002); *see also Matteo v. SCI Albion*, 171 F.3d 877, 890 (3d Cir. 1999) ("[W]e do not believe federal habeas courts are precluded from considering the decisions of the inferior federal courts when evaluating

whether the state court's application of the law was reasonable. . . . Thus, in certain cases it may be appropriate to consider the decisions of inferior federal courts as helpful amplifications of Supreme Court precedent.").

It is the unreasonableness prong with which we are concerned today. My colleagues conclude that it was not "objectively unreasonable" for the Pennsylvania Supreme Court "to find [that] Abu-Jamal had not established a prima facie case based on either a pattern of peremptory strikes or any other circumstances." Maj. Op. 52. They further determine that "the record does not include evidence of the number or racial composition of the venire," rendering "the record . . . fatally deficient to support a successful challenge to the Pennsylvania Supreme Court's decision finding no prima facie case under *Batson*." Maj. Op. 48.

Despite the deferential standard of review, I believe that the Pennsylvania Supreme Court unreasonably applied *Batson* in finding that Abu-Jamal failed to satisfy his *prima facie* burden and, on that basis, denying the claim without conducting the next, required steps of the *Batson* inquiry. The evidence here points to the conclusion that there was a *prima facie* case. Moreover, that it is now impossible for a judge to engage in a more comprehensive consideration of the *Batson* challenge here (*i.e.*, without complete data about the strike and

exclusion rates,[41] as well as the racial and numerical composition of the entire jury venire) does not mean that we should dispense with *Batson's* promise of ending discrimination in jury selection. To the contrary, Abu-Jamal is entitled to remand for consideration of his claim on the evidence that does exist and for further development of the record. *See Hardcastle*, 368 F.3d at 262.

A. Establishing a *Prima Facie* Case Is a Light Burden

As pointed out in the majority opinion, *Batson* developed a burden-shifting framework to evaluate the constitutionality of peremptory challenges based on race: "First, the defendant must establish a prima facie case of purposeful discrimination. Second, if a prima facie case is found, the prosecution must articulate a race-neutral justification for the challenged strikes. Third, after considering both parties' submissions, the trial court must determine whether the defendant has established purposeful discrimination." Maj. Op. 38

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[41]As the majority explains, the "strike rate" is calculated "by comparing the number of peremptory strikes the prosecutor used to remove black potential jurors with the prosecutor's total number of peremptory strikes exercised." Maj. Op. 42. By contrast, the "exclusion rate" is "calculated by comparing the percentage of exercised challenges used against black potential jurors with the percentage of black potential jurors known to be in the venire." Maj. Op. 42-43.

(citing *Batson*, 476 U.S. at 96-98; *Miller-El v. Cockrell*, 537 U.S. 322, 328-29 (2003)).

To establish a *prima facie* case under *Batson*'s first prong is, in turn, also a three-part inquiry (though the second step of that inquiry is self-answering):

> [First,] the defendant . . . must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

Batson, 476 U.S. at 96 (citations omitted); *accord Johnson v. California*, 545 U.S. 162, 169 (2005).[42]

The burden of establishing a *prima facie* case is easily met. In lowering the standard for making out a *prima facie* case of discriminatory *voir dire* practice through the use of peremptory strikes, *Batson* pointed to the evidentiary framework for *prima facie* claims in Title VII discrimination cases. *Batson*, 476 U.S. at 93-94 & nn.18-19 (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). There the *prima facie* burden is "not onerous." *Burdine*, 450 U.S. at 253. As in the Title VII context, the Supreme Court has emphasized that the overriding purpose is to eliminate discrimination. *See Batson*, 476 U.S. at 99 n.22. It seems only reasonable then that, as with Title VII, the burden for making out a *prima facie* case under *Batson* is also not heavy. *See Johnson*, 545 U.S. at 170 (noting that the *prima facie* case under *Batson*, like in the Title VII context, is not "onerous");[43] *see*

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[42]In *Powers v. Ohio*, 499 U.S. 400 (1991), the Supreme Court modified the *Batson prima facie* case to allow a defendant to raise a *Batson* challenge in cases where the defendant and the excluded juror are not of the same race.

[43]In *Johnson*, the Court explained that it "did not intend [*Batson*'s] first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not

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also Aspen v. Bissonnette, 480 F.3d 571, 574 (1st Cir. 2007) ("[T]he Supreme Court has recently reiterated that the *Batson* prima facie standard is not onerous." (citing *Johnson*, 545 U.S. at 170)).[44]

We should not, therefore, raise the burden higher than what the Supreme Court requires. *See Sorto v. Herbert*, 497 F.3d 163, 178 (2d Cir. 2007) (Pooler, J., dissenting) ("[W]e do both defendants and ordinary citizens a disservice when we create

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[43](...continued)
the product of purposeful discrimination." 545 U.S. at 170. To the contrary, "a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Id.* While *Johnson* post-dates the decisions in Abu-Jamal's case, it is relevant in pointing out that the low threshold for making a *prima facie* case was clear and has not changed since *Batson*. *See Aspen v. Bissonnette*, 480 F.3d 571, 574 n.2 (1st Cir. 2007) ("Supreme Court opinions issued after the state court decision in question are relevant to the AEDPA analysis to the extent that they restate the clearly established law from earlier Supreme Court opinions.").

[44]In this context, were we to summarize *Batson* in layperson's terms, a defendant needs to raise, based on whatever evidence exists, a reasonable possibility that the prosecutor intended to exclude from the jury but one person because of race. If so, the prosecutor can counter by presenting race-neutral reason(s) for excluding the person(s) identified. That done, a Court must evaluate the evidence and determine whether purposeful discrimination did occur.

unnecessary obstacles to [the assertion of a *Batson* claim].").

B. A Single Improper Strike Is Enough

Batson was "designed to ensure that a State does not use peremptory challenges to strike *any* black juror because of his race." 476 U.S. at 99 n.22 (emphasis added). Following suit, we have repeatedly said that a defendant can make out a prima *facie case* for jury-selection discrimination by showing that the prosecution struck a single juror because of race. *Holloway v. Horn*, 355 F.3d 707, 720 (3d Cir. 2004) ("Consistent with [*Batson*] principle[s], courts have recognized that a prosecutor's purposeful discrimination in excluding even a single juror on account of race cannot be tolerated as consistent with the guarantee of equal protection under the law." (citing *Harrison v. Ryan*, 909 F.2d 84, 88 (3d Cir. 1990))). In fact, in *United States v. Clemons*, 843 F.2d 741, 747 (3d Cir. 1988), we explained that "[s]triking a single black juror could constitute a prima facie case even when blacks ultimately sit on the panel and even when valid reasons exist for striking other blacks." *Accord Snyder*, 2008 WL 723750, at *4; *Simmons v. Beyer*, 44 F.3d 1160, 1167 (3d Cir. 1995); *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994); *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987).

Yet the majority focuses on the absence of information about the racial composition and total number of the venire, claiming that this statistical information – from which one can compute the exclusion rate – is necessary to assess whether an inference of discrimination can be discerned in Abu-Jamal's case. Such a focus is contrary to the nondiscrimination principle underpinning *Batson*, and it conflicts with our Court's precedents, in which we have held that there is no "magic number or percentage [necessary] to trigger a *Batson* inquiry," and that "'*Batson* does not require that the government adhere to a specific mathematical formula in the exercise of its peremptory challenges.'" *Clemons*, 843 F.2d at 746 (quoting *United States v. Montgomery*, 819 F.2d 847, 851 (8th Cir. 1987)).

C. All Relevant Circumstances Must Be Taken into Account

Not only is one instance of juror discrimination enough to make a *prima facie* showing, but courts must look at "all relevant circumstances" to determine whether they "give rise to an inference of discrimination." *Batson*, 476 U.S. at 96-97. *Batson* provides a non-exhaustive list of factors. *See id.* at 97 ("These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges create[] a prima facie

case of discrimination against black jurors."). One of these factors is whether a "'pattern' of strikes against black jurors . . . in the particular venire might give rise to an inference of discrimination." *Id.* Another is "the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges[, which] may support or refute an inference of discriminatory purpose." *Id.* In addition to the two factors specifically articulated in *Batson*, our Court has explained that the following factors may be relevant to the analysis: "(1) the number of racial group members in the panel, (2) the nature of the crime,[45] and] (3) the race of the defendant and the victim." Simmons, 44 F.3d at 1167; *see also Clemons*, 843 F.2d at 748. This list is not exhaustive, as "[o]ur discussion should not be construed as barring trial judges

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[45]As an example of how this plays out, in *Riley* we made special mention that the crime gave rise to a capital case: "We cannot avoid noting that *Batson* was not a death penalty case. This is. If the State failed to accord Riley his constitutional right to a jury selected on a race-neutral basis, we must not shirk to so hold." 277 F.3d at 287. The Supreme Court has repeatedly emphasized the need for heightened safeguards in capital cases because "death is different" in harshness and finality from any other punishment. *See, e.g., Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring) ("[The] Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty."); *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment . . . ."); *id.* at 289 ("Death . . . is in a class by itself.").

from addressing other facts and circumstances or as binding trial judges by our illustrative list." *Clemons*, 843 F.2d at 748.

D. Consideration of the Relevant Factors Establishes a *Prima Facie* Case

It is with these factors in mind that I turn to the facts of Abu-Jamal's case developed to date. While there is a limited record in this case – after all, Abu-Jamal's trial took place before the Supreme Court had laid out the *prima facie* framework in – we do have enough information before us from which to conclude that he established a *prima facie* case of racial discrimination in jury selection. First, Abu-Jamal is black, and therefore "a member of a cognizable racial group." *Batson*, 476 U.S. at 96. Additionally, we know that the prosecutor exercised peremptory challenges against black prospective jurors.[46] Thus, Abu-Jamal clearly

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[46]The fact that a prosecutor does not use all of his strikes against blacks or that the actual jury picked has some black members (as here, where there were two black jurors in the end) does not undermine the *prima facie* case. *See Brinson v. Vaughn*, 398 F.3d 225, 233 (3d Cir. 2005) ("[A] prosecutor may violate *Batson* even if the prosecutor passes up the opportunity to strike some African American jurors. . . . Thus, a prosecutor's decision to refrain from discrimination against some African American jurors does not cure discrimination against others."); *Holloway*, 355 F.3d at 720 ("[A] prosecutor who intentionally discriminates against a

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meets the first prong of *Batson*'s *prima facie* inquiry.

With regard to the second prong, Abu-Jamal is "entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." *Id.* (internal quotation marks omitted). Thus, having satisfied the first two prongs of the *prima facie* case, we reach the point where I depart from my colleagues.

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[46](...continued)
prospective juror on the basis of race can find no refuge in having accepted others [sic] venirepersons of that race for the jury."); *id.* at 728-29 ("The final composition of the jury . . . offers no reliable indication of whether the prosecutor intentionally discriminated in excluding a member of the defendant's race. . . . A defendant can make a prima facie case of discrimination without reference to the jury's racial makeup.") (citation omitted); *see also Simmons*, 44 F.3d at 1167-68; *Clemons*, 843 F.2d at 747.

Moreover, the defense's striking putative black jurors is not a reason to defeat a *Batson* claim. *Brinson*, 398 F.3d at 234 ("Suppose that the defense dismisses a particular African American juror for a permissible non-racial ground and that the prosecution then strikes other African American jurors based on their race. The legitimate defense strike would not open the door for illegitimate prosecution strikes.").

To meet the third and final prong of the *prima facie* case – and thus shift the burden to the Commonwealth to articulate race-neutral justifications for the challenged strikes – all Abu-Jamal needs to do is "show that these facts and other relevant circumstances raise an inference that the prosecutor . . . excluded the veniremen . . . on account of their race." *Id.* Bear in mind that Abu-Jamal does not need to prove that the prosecutor was actually acting to strike jurors on account of their race; to the contrary, he only needs to "*raise an inference*" that discrimination was afoot.

We know that the prosecutor exercised 15 peremptory strikes, 10 of which were used to remove black venirepersons. *Commonwealth v. Abu-Jamal*, No. 1357, 1995 WL 1315980, at *103 (C.P. Ct. Phila. Cty. Sept. 15, 1995) (hereinafter *PCRA Op.*). That means that the "strike rate" for blacks was 66.67%. As the Supreme Court has noted, "[h]appenstance is unlikely to produce this disparity." *Miller-El*, 537 U.S. at 342 ("In this case [where 10 of 14 peremptory strikes were used against black venirepersons, resulting in a strike rate of 71.43% and an exclusion rate of 91%] the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors.").[47] It is

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[47] In *Miller-El*, the Supreme Court had available both

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my belief that the 66.67% strike rate, without reference to the total venire, can stand on its own for the purpose of raising an inference of discrimination. *See Batson*, 476 U.S. at 97.

My colleagues attempt to downplay the strike rate by saying that it is essentially meaningless without reference to the racial makeup of the venire as a whole. They claim it is impossible to understand such a high strike rate without "contextual markers" about the entire jury venire. Maj. Op. 47. While such "markers" would be helpful, the lack of a record containing that information should not serve as an absolute bar to Abu-Jamal's claim.[48]

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[47](...continued)
the strike rate and the racial composition of the venire, which allowed it to calculate the exclusion rate. Thus, the Court could determine that the prosecution used 10 of its 14 strikes (a 71.43% strike rate) to strike 91% of the eligible black venire pool. 545 U.S. at 240-41. Here, we do not have information about the racial composition of the total venire pool, but we have a similarly striking strike rate.

[48]My colleagues correctly assert that Abu-Jamal had the burden of establishing his *prima facie* case. They note – as did the Court of Common Pleas on PCRA review and the District Court – that Abu-Jamal had the opportunity at a 1995 PCRA hearing to take testimony from the trial prosecutor, Joseph McGill, but chose not to do so. Maj. Op. 47-49; *PCRA Op.*, 1995 WL 1315980, at *21 n.8; *Abu-Jamal*, 2001 WL 1609690, at *106. My colleagues contend that Abu-Jamal's decision not to elicit McGill's testimony is

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Simply put, the failure to develop a record of the entire venire pool or all black members in that pool (against which to compare the prosecutor's use of peremptory strikes) does not defeat a *prima facie* *Batson* claim. This is because *Batson* does not place the burden on the petitioner to develop a full statistical accounting in order to clear the low *prima facie* hurdle of the *Batson* analysis. *See Holloway*, 355 F.3d at 728.

In *Holloway*, we emphasized that "requiring the presentation of [a record detailing the race of the venire] simply to move past the first [*prima facie*] stage in the *Batson* analysis places an undue burden upon the defendant." *Id.* at 728. There we found that the strike rate – 11 of 12 peremptory strikes against black persons – satisfied the *prima facie* burden despite the lack of contextual markers

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[48](...continued)
"noteworthy," and they intimate that such testimony would have shed light on the strike and exclusion rates. Maj. Op. 48 n.19, 49. However, McGill's testimony goes to whether he had race-neutral reasons at *Batson* step two that could explain an otherwise *prima facie* claim at *Batson* step one (assuming that Abu-Jamal established one). Abu-Jamal's failure to question the prosecutor should not, and cannot reasonably, be taken into consideration to defeat a *prima facie* claim. The cart (step two) cannot come ahead of the horse (step one).

my colleagues now seek here.[49] *Id.* at 729;[50] *see also*

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[49]My colleagues assert that *Holloway* is distinguishable because the Court did not apply AEDPA's deferential standard of review, finding instead that the pre-AEDPA standard of *de novo* review was appropriate. Maj. Op. 49 n.21. However, our Court "note[d] that relief would be warranted even if our analysis were confined by the requirements of AEDPA, as the Pennsylvania Supreme Court's PCRA decision was 'contrary to' and an 'unreasonable application of' the *Batson* standard." *Holloway*, 355 F.3d at 729.

[50]In *Holloway*, we specifically rejected the requirement that a petitioner develop a complete record of the jury venire when we rejected Pennsylvania's so-called *Spence* rule. In *Commonwealth v. Spence*, the Pennsylvania Supreme Court affirmed the denial of a capital defendant's *Batson* challenge on the ground that he failed to make an adequate record to permit meaningful review of the trial court's failure to find a *prima facie* case. 627 A.2d 1176, 1182-83 (Pa. 1993) (noting that the defendant has not "specifically identif[ied] the race of all the veniremen who had been removed by the prosecution, the race of the jurors who served, or the race of jurors acceptable to the Commonwealth who had been stricken by the defense"). In *Holloway*, we deemed the *Spence* rule inconsistent with *Batson*'s burden-shifting framework:

> Notably absent from the *Batson* discussion of the prima facie case is any call for trial judges to seek the type of statistical accounting required by the *Spence* rule nor do we see how such an accounting fits within *Batson*'s first step. A trial judge undoubtedly might find in a given case that a full accounting regarding

(continued...)

Simmons, 44 F.3d at 1168.

We have relied on the strike rate alone despite the absence of other contextual markers in post-AEDPA cases. In *Brinson v. Vaughn*, 398 F.3d 225 (3d Cir. 2005), we ruled that it was an unreasonable application of law to find that the petitioner had not made out a *prima facie* case where the prosecutor had allegedly used 13 of his 14 peremptory challenges against black potential jurors. *Id.* at 235. We did not have information about the total venire or number of black persons in that venire, but we nevertheless held that "[t]he pattern of strikes alleged by the defense is alone sufficient to establish a prima facie case under the [present] circumstances." *Id.* This was so even though "other factors suggestive of possible racial discrimination on the part of the prosecution [we]re not present in the record of th[e] case." *Id.* We emphasized that "[s]uch a pattern, of course, does not

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[59](...continued)
the race of the venire and the jurors struck would be helpful at the third stage of the *Batson* analysis, after it has heard the prosecutor's explanation for the strikes and must "determine if the defendant has established purposeful discrimination." But requiring the presentation of such a record simply to move past the first stage in the *Batson* analysis places an undue burden upon the defendant.

355 F.3d at 728 (citation omitted).

necessarily establish racial discrimination, but particularly in the absence of any circumstance (such as a venire composed almost entirely of African Americans) that might provide an innocent explanation, such a pattern is more than sufficient to require a trial court to proceed to step two of the *Batson* procedure." *Id.*

Furthermore, in *Hardcastle* we also faced the problem of an underdeveloped record. And yet we concluded (at least implicitly[51]) that a *prima facie* case existed by relying on the strike rate, where the prosecutor used 12 of her 20 strikes against black candidates for the jury.[52] We remanded the case

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[51]I say "implicitly" because we read the Pennsylvania Supreme Court's opinion as conceding that the petitioner had satisfied his *prima facie* burden under *Batson*'s first step. *Hardcastle*, 368 F.3d at 256. However, we independently concluded that this conclusion was "appropriate" "[i]n view of the fact that twelve of the prosecutor's peremptory strikes were exercised against African-American members of the venire." *Id.*

[52]When our Court considered *Hardcastle*, we knew that "the prosecutor used her peremptory strikes, of which she had a total of twenty, to remove twelve of the fourteen African-American members of the venire." 368 F.3d at 251. On remand to the District Court, the record was clarified that in fact the prosecutor only used fifteen of the available twenty peremptory strikes – twelve to remove black potential jurors, one to remove a Hispanic potential juror, and two to remove white potential jurors. *See Hardcastle v. Horn*,

(continued...)

for an evidentiary hearing to allow the Commonwealth to offer race-neutral reasons and for a reexamination of the merits of *Batson* on steps two and three.

Inasmuch as decisions of the lower federal courts are illustrative of what is reasonable – and *Brinson* and *Hardcastle* are decisions of our own Court – they are instructive of the outcome in this case. Abu-Jamal made out a *prima facie* case, calling for the courts to go further to test whether racial discrimination tainted the makeup of the jury that decided his guilt, and the failure of the Pennsylvania Courts to recognize this was an unreasonable application of the law.

Yet even setting aside statistical calculations about the strike and exclusion rates, the other relevant factors in this case further demonstrate that Abu-Jamal has satisfied his *prima facie* burden. At the very least, my colleagues and the Pennsylvania Courts should have considered that this was a racially charged case, involving a black defendant and a white victim. *See Simmons*, 44 F.3d at 1168

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[52](...continued)
521 F. Supp. 2d 388, 392 (E.D. Pa. 2007). This new information does not, of course, undermine our Court's conclusion that when a prosecutor uses twelve of an available twenty peremptory challenges to remove black potential jurors, it is appropriate to find that the petitioner has met his *prima facie* burden.

("The nature of the crime and its racial configuration . . . contribute significantly to [a] prima facie case.").[53] It is further noteworthy that Abu-Jamal was a member of the Black Panther Party and that he was charged with killing a police officer. Finally, it cannot be ignored that this is a capital case. *See Riley*, 277 F.3d at 287.

My colleagues dispense with these considerations in a footnote, stating merely that "Abu-Jamal has not demonstrated that these allegations make the Pennsylvania Supreme Court's decision objectively unreasonable." Maj. Op. 46 n.17. Their cursory consideration of these critical factors mirrors that of the Pennsylvania Courts. I believe this misapplies *Batson*, for it fails to "consider all relevant circumstances" of our case.

I am mindful that, under AEDPA, our role is to determine whether "[t]he state court's application of clearly established law [was] objectively unreasonable." *Lockyer*, 538 U.S. at 75. However, because *Batson*'s *prima facie* burden is low-set, and

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[53]In *Simmons*, we had no record of the total venire, yet we nevertheless found that the defendant had established a *prima facie* case based on "[t]he combination of Simmons' race, the prosecution's exclusion of at least one potential African American juror, and the circumstances surrounding the crime," which involved "the murder and robbery of an elderly [C]aucasian physician by a young African American man." 44 F.3d at 1168.

after looking at the strike rate and other relevant factors in this case, I conclude that it was objectively unreasonable for the Pennsylvania Supreme Court to determine that Abu-Jamal failed to make out a *prima facie* case. I would hold that Abu-Jamal met his *prima facie* burden and remand to the District Court to hold a hearing to complete the *Batson* analysis. *See Hardcastle*, 368 F.3d at 261-62.

III. Conclusion

Prima facie means "[a]t first sight." Black's Law Dictionary 1228 (8th ed. 2004). I believe that Abu-Jamal presents a case that, at first sight, infers (*i.e.*, suggests) a reasonable possibility that the prosecutor excluded potential black jurors because of race. This inference requires courts to look further. To move past the *prima facie* case is not to throw open the jailhouse doors and overturn Abu-Jamal's conviction. It is merely to take the next step in deciding whether race was impermissibly considered during jury selection in his case. Having determined that Abu-Jamal met his *prima facie* burden at step one, I would remand for the District Court to complete an analysis of the remaining steps of the *Batson* claim, starting at step two, where the burden shifts to the Commonwealth to "come forward with a neutral explanation for challenging black jurors." *Batson*, 476 U.S. at 97. If the Commonwealth does so, the Court should proceed to step three and assess whether the

reason(s) given are valid or pretextual in determining, on the basis of the evidence presented, whether purposeful discrimination did occur. *See id.* at 98.

No matter how guilty one may be, he or she is entitled to a fair and impartial trial by a jury of his or her peers. As *Batson* reminds us, "[t]he core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of . . . race." *Id.* at 97-98. I fear today that we weaken the effect of *Batson* by imposing a contemporaneous objection requirement where none was previously present in our Court's jurisprudence and by raising the low bar for a *prima facie* case of discrimination in jury selection to a height unattainable if enough time has passed such that original jury records are not available. In so holding, we do a disservice to Batson. I respectfully dissent.

(EXCERPT)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MUMIA ABU-JAMAL, Petitioner,	:	CIVIL ACTION
v.	:	
MARTIN HORN, Commissioner, Pennsylvania Department of Corrections, ET AL., Respondents.	:	NO. 99-5089

Memorandum and Order

YOHN, J. December 18, 2001

* * * *

III.25 CONSTITUTIONAL DEFICIENCIES IN THE VERDICT FORM AND JURY CHARGE SUGGESTED THAT A FINDING OF MITIGATING CIRCUMSTANCES REQUIRED UNANIMOUS ACTION IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE 8TH AND 14TH AMENDMENTS.

A. Allegations in Support of Claim

Petitioner claims that the appearance of the verdict form unconstitutionally suggested to the jury that it could not consider any particular mitigating circumstance unless the panel agreed unanimously as to its existence. *See* P1 ¶¶ 596-602. He asserts that this confusion was compounded by the instructions that were intended to clarify the jury's role. Id. ¶ 602.

B. Violation of Federal Constitution, Law or Treaty

Petitioner argues that he was deprived of his right to a fair and reliable determination of punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. See P14 at 91-92 (citing *Mills v. Maryland*, 486 U.S. 367, 384 (1988); *McKoy v. North Carolina*, 494 U.S. 433 (1990)). Specifically, he asserts that a parallel exists between the facts of his case and those at issue in *Mills*, where the Court found "a substantial probability that reasonable jurors, upon receiving the judge's instructions . . ., and in attempting to complete the verdict form as instructed, may well have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Mills*, 486 U.S. at 384; *see also Boyde v. California*, 494 U.S. 370, 380 (1990) (modifying the *Mills* standard for reviewing

jury instructions alleged to restrict a sentencer's consideration of relevant evidence by holding that the question properly asked by a reviewing court is "whether there is a reasonable likelihood that the jury [as opposed to a reasonable individual juror] has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence").[80] Accordingly, petitioner claims, the penalty determination in his case was conducted in violation of *Mills*.

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[80]While the Third Circuit repeatedly has noted the applicability of the *Boyde* standard in assessing *Mills* claims, *see Banks v. Horn*, 2001 WL 1349369, at *16 (3d Cir. Oct.31, 2001) and *Frey v. Fulcomer*, 132 F.3d 916, 921 (3d Cir. 1997), the court of appeals also has at least mentioned an alternate, arguably less stringent standard for determining whether *Mills* has been violated. *See, e.g., Banks*, 2001 WL 1349369, at *13 ("Proper application of *Mills* requires at the outset that the reviewing court examine the entire jury instructions, posing the 'critical question' whether a reasonable jury *could have concluded* . . . that unanimity was required to find a mitigating circumstance.") (emphasis added); *Frey*, 132 F.3d at 923 ("[W]e must determine whether it is reasonably likely that the jury *could have understood* the charge to require unanimity in consideration of mitigating evidence.") (emphasis added). There is no dispute, however – and indeed, both *Frey* and *Banks* make this point explicitly – that the standard to be applied to *Mills* claims is that articulated in *Boyde*. Accordingly, I am concerned in evaluating petitioner's *Mills* claim with whether there is "a *reasonable likelihood* that the jury *has* applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380 (emphasis added).

Respondents contend that petitioner's *Mills* argument was first raised in the 1995 PCRA hearing, where it was advanced only as an ineffective assistance of counsel claim. This claim was meritless, they assert, because trial counsel could not have been ineffective "in not predicting the 1988 *Mills* decision in 1982." R23 at 158 (citing *Sistrunk v. Vaughn*, 96 F.3d 666, 670-71 (3d Cir. 1996)). Respondents also allege that petitioner's claim fails on its merits. They posit that petitioner bases his argument solely on the jury verdict form, and does not focus at all on the instructions delivered by the trial court.[81] R23 at 159. They contend that this in

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[81]This, however, is inaccurate. Although the bulk of petitioner's *Mills* claim is concerned with the effect of the verdict form, petitioner explicitly contends that "[t]he court's instructions, far from correcting the jury's misunderstanding based on the form, would have compounded that misunderstanding." P1 ¶ 602. Accordingly, the effect of both the verdict sheet and the instructions have been raised by petitioner. Moreover, as respondents themselves concede, in evaluating a claim pursuant to *Mills v. Maryland*, "the [verdict] form cannot properly be viewed in isolation from the court's penalty phase instructions." R23 at 161.

Respondents also assert that *Frey* is unavailable to petitioner as a basis for relief because, under the AEDPA, habeas relief is available only to one in custody "pursuant to the judgment of a State court" only if that order is "contrary to, or an unreasonable violation of clearly established Federal law as determined by the Supreme Court of the United States." R23 at 163 (quoting 28 U.S.C. § 2254). They assert

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itself distinguishes petitioner's argument from that advanced successfully in *Frey v. Fulcomer*. *See* R23 at 162 (citing *Frey*, 132 F.3d 916, 923 (3d Cir. 1997)). Nonetheless, they assert that the jury explicitly was instructed that unanimity was required only if a particular aggravating circumstance was found to exist, or if no mitigating circumstances were found to exist. *See id.* They allege that the trial court's instructions did not indicate the need for unanimity in order to find any particular mitigating circumstance. *See id.*

Respondents also argue that the verdict form itself contained no indication that unanimity was a necessary prerequisite to the jury finding the existence of mitigating circumstances, and that it did not in any way contradict the trial court's clear instruction that such a finding need not be

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[81](...continued)
that because *Frey* is a decision of the Third Circuit, it does not qualify under the AEDPA standard. This contention, however, is incorrect because *Frey* does not purport itself to be a basis for relief independent of *Mills*. Rather it simply is an application of *Mills*, with the holding of the Supreme Court being the legal basis for relief. It is indisputable that I may look to *Frey* – or to any other decision of the court of appeals – as an authoritative interpretation of the Supreme Court's holding. As stated by the Third Circuit in *Matteo*, "we do not believe federal habeas courts are precluded from considering the decisions of the inferior federal courts when evaluating whether the state court's application of the law was reasonable." 171 F.3d at 890.

unanimous. Respondents rely on the Third Circuit's holding in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991), a case they denote as factually apposite the instant matter, as support for their conclusion that "'[n]either the court nor the verdict sheet stated that the jury could weigh only those mitigating circumstances which it found unanimously." R23 at 161 (quoting *Zettlemoyer*, 923 F.2d at 308).

Petitioner did not raise the *Mills* issue at trial (*Mills* not having been decided), or on direct appeal. He did raise it in his PCRA action. However, the PCRA court found that because petitioner had failed previously to raise this claim, it was waived. *PCRA Op. C.L.* ¶ 171. As such, the court concluded that *Mills* could not form the basis for post-conviction relief. *See id.* (citing 42 Pa.C.S. § 9543(a)(3)). In any event, noting that no evidence had been offered on the issue, the PCRA court went on to consider petitioner's *Mills* claim on its merits and found no constitutional violation, reasoning that similar verdict forms and instructions had been upheld by the Third Circuit in *Zettlemoyer* and by the Pennsylvania Supreme Court in several cases. *See id.* ¶¶ 172-73 (citations omitted).

In affirming the PCRA court's decision, the Pennsylvania Supreme Court also noted that petitioner had offered no evidence in support of this claim at the PCRA hearing. *See PCRA Appeal Op.* at 119. Moreover, the court distinguished *Mills* on

the ground that the *Mills* verdict sheet, unlike that in petitioner's case, used the term "unanimously" in the context of both aggravating and mitigating circumstances. *See id.* The state supreme court further stressed that the unanimity requirement in petitioner's case was found only on page 1 of the verdict slip, whereas the mitigating circumstances were listed on page 3. *See id.* Additionally, the court found that the requirement that all twelve jurors sign the third page of the verdict slip was "of no moment since those signature lines naturally appear at the conclusion of the form and have no explicit correlation to the check list of mitigating circumstances." *Id.* The court therefore concluded that the structure of the form did not lead the jurors to believe that they must agree unanimously as to the existence of mitigating evidence before such factors could be considered. *See id.*

The Pennsylvania Supreme Court identified the correct federal law as determined by the Supreme Court of the United States, *i.e.*, the *Mills* decision. As such, the state supreme court did not "apply a rule that contradicts the governing law set forth" by the Supreme Court. *See Terry Williams*, 529 U.S. at 405. The issue, then, is whether there was an unreasonable application of *Mills* in petitioner's case.[82]

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[82]Indeed, it is important to reiterate here that the

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[82](...continued)
standards under which petitioner's *Mills* claim must be evaluated are those set forth in the AEDPA. This is to be contrasted with the Third Circuit's analysis in *Frey*, which employed pre-AEDPA standards in determining whether a violation of *Mills* had been effected in that case. Therefore, habeas relief will not be warranted pursuant to *Mills* if it is merely the case that, had I evaluated petitioner's *Mills* claim *ab initio*, I would have found it to be meritorious. *See Matteo*, 171 F.3d at 889. Put differently, a significant degree of deference is due the state supreme court's application of federal law. Instead, if petitioner is to be granted a writ of habeas corpus pursuant to this claim, it must necessarily be the case that the Pennsylvania Supreme Court's determination *Mills* had not been transgressed was "contrary to," or "involved an unreasonable application of" the United States Supreme Court's decision in that case. *See* 28 U.S.C. 2254(d)(1); *Terry Williams*, 529 U.S. at 405.

However, given, that the propriety of habeas relief based on this claim turns on the application of law (i.e. *Mills*) to facts, and that the facts of this case are materially distinguishable from those at issue in *Mills* – for example, the language employed by the verdict form and by the trial court in instructing the jury in petitioner's case diverges from that at issue in *Mills* – the "contrary to" standard for relief is inapplicable here. *See Terry Williams*, 529 U.S. at 406 ("[A] run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause."). Accordingly, the court will inquire whether the Pennsylvania Supreme Court, in denying petitioner's *Mills* claim, applied unreasonably that holding.

C. "Contrary to" or "Unreasonable Application of" Clearly Established Federal Law

Preliminarily, this claim is properly before the court. Although the Commonwealth urges that petitioner raised the *Mills* issue only by way of a claim alleging ineffective assistance of counsel, both the PCRA court and the Pennsylvania Supreme Court indicated that the *Mills* claim was before them on its merits.[83] The PCRA court specifically stated that "[p]etitioner claims the verdict form in this case violated the rule in the later decided[84] case of *Mills v. Maryland*, 486 U.S. 367

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[83]While the PCRA court, as stated, indicated the applicability of a state law procedural bar to petitioner's *Mills* claim, nothing in its discussion of this claim supports the Commonwealth's position that petitioner did not advance the *Mills* issue on its merits. Quite the contrary, it affirmatively indicated that petitioner had done so. *See PCRA Op. C.L.* ¶ 172.

[84]Although *Mills*, handed down on June 6, 1988, was decided after petitioner was sentenced to death, it nonetheless antedated the finality of petitioner's conviction, which was registered on October 1, 1990, when the United States Supreme Court denied his petition for a writ of certiorari. *See, e.g., Gray v. Netherland*, 518 U.S. 152, 180 (1996) (noting that a conviction becomes final upon the United States Supreme Court's denial of a writ of certiorari on a defendant's direct appeal). Accordingly, no retroactivity analysis is mandated pursuant to *Teague v. Lane*, 489 U.S.

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(1988)." *PCRA Op. C.L.* ¶ 172; *see also PCRA Appeal Op.* at 119 ("Appellant . . . submits that the penalty phase verdict slip was constitutionally defective pursuant to the dictates of *Mills v. Maryland* . . . ."). Because the claim thus was fairly presented to the state courts, the exhaustion requirement is satisfied. *See* Amend. St. PCRA Pet. ¶¶ 149-50; St. PCRA Mem. at 154-60. Because it also was adjudicated on the merits by the state courts, *see PCRA Op. C.L.* ¶¶ 171-73; *PCRA Appeal Op.* at 119, it is subject to the strictures of § 2254(d).

Mills *and Its Application Within the Third Circuit*

In *Mills*, the petitioner argued that Maryland's capital sentencing scheme, as explained to the jury by the court's instruction and as implemented by the verdict form, was unconstitutional. This was so, he contended, because the verdict sheet and jury charge conveyed to the jury the false impression that unanimity was required if any

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[84](...continued)
288, 299-301(1989). *See Matteo*, 171 F.3d at 902 ("If the petitioner either seeks relief on the basis of a 'new rule' (i.e ., a decision issued after the conviction became final) or seeks relief that would require the habeas court to announce (and retroactively apply) a new rule, *Teague* sharply restricts the habeas court's review."). The same can be said of *Boyde v. California*, decided on March 5, 1990.

given mitigating circumstance was to be found to exist, and thus considered by the panel in its sentencing determination. *See* 486 U.S. at 375-76. The Court agreed, holding that although it was unable to determine with certainty what the jury actually believed, there was a "substantial probability that reasonable jurors," upon considering the verdict form and the instruction, would have concluded that a mitigating circumstance which had been found to exist by less than a unanimous jury could not be considered.[85] 486 U.S. at 384.

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[85]This impression was created specifically by the combined effect of the jury charge and verdict form. The verdict sheet, as explained by the judge's instructions, was tripartite. Section I pertained to aggravating circumstances, and in explaining the jury's responsibilities vis-a-vis this section, the trial court stated: "[Y]ou must consider whether the aggravating circumstance . . . has been proven beyond a reasonable doubt. If you unanimously conclude that it has been so proven, you should answer that question yes. *If you are not so satisfied, then of course you must answer no.*" *Mills*, 486 U.S. at 378 (emphasis original).

Section II concerned mitigating circumstances. That section of the form featured identical language, except that a preponderance of the evidence standard was articulated for the determination of the existence of mitigating circumstances. Specifically, it read: "Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist by a preponderance of the evidence and each mitigating circumstance marked 'no' has not been proven by a preponderance

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[85](...continued)
of the evidence . . . ." *Mills*, 486 U.S. at 387. The jury again was instructed to mark each answer "yes" or "no." In reviewing the impression created by the verdict form and this instruction, the Court found that "[a]lthough it was clear that the jury could not mark 'yes' in any box without unanimity, nothing the judge said dispelled the probable inference that 'no' is the opposite of 'yes,' and therefore the appropriate answer to reflect an inability to answer a question in the affirmative." *Id.* at 378. Put differently, just as the jury was instructed to indicate the absence of an aggravating circumstance if they were unable to agree to its existence, they implicitly were directed to follow this same procedure in the context of mitigating circumstances. However, the Court proceeded to point out that "[n]o instruction was given indicating what the jury should do if some but not all of the jurors were willing to recognize something about petitioner . . . as a mitigating factor." *Id.* at 379.

Section III was the balancing section; this was the place in which those aggravating circumstances found in Section I were to be weighed against the mitigating circumstances found in Section II. As the Court stated, however, "Section III instructed the jury to weigh only those mitigating circumstances marked 'yes' in Section II ." Accordingly, the Court found that

> A jury following the instructions set out in the verdict form could be "precluded from considering, *as a mitigating factor*, [an] aspect of a defendant's character or record [or a] circumstanc[e] of the offense that the defendant proffer[ed] as a basis for a sentence less than death," if even a single juror adhered to the
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> (continued...)

This, the Court found, violated the constitutional rule announced in *Lockett v. Ohio* and applied in *Eddings v. Oklahoma* that in a capital case "the sentencer [may] not be precluded from weighing, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings*, 455 U.S. 104, 110 (1982) (quoting *Lockett*, 438 U.S. 586, 604 (1978)) (emphasis original), *quoted in Mills*, 486 U.S. at 374. As explained by the Third Circuit, "[t]he source of this preclusion is irrelevant; whether its source is statutory . . ., the sentencing court . . ., or an evidentiary ruling . . ., the result is the same." *Frey*, 132 F.3d at 920. Indeed, where a jury returns a sentence of death after having been prevented from considering relevant mitigating evidence, that sentence must be invalidated.

As alluded to above, *Mills* repeatedly has been applied in this circuit. In *Zettlemoyer*, our Court of Appeals evaluated a jury charge that read, in pertinent part, as follows:

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[85](...continued)
view that such a factor should not be so considered.

486 U.S. at 380 (quoting *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986)).

> The verdict, of course, must be unanimous. Again, if you find unanimously, beyond a reasonable doubt, the aggravating circumstance that I have mentioned . . . and no mitigating circumstances or if you find that the aggravating circumstance which I mentioned to you outweighs any mitigating circumstance you find, your verdict must be the death penalty. If, on the other hand, you find that the Commonwealth has not proven an aggravating circumstance beyond a reasonable doubt or if they have, that the mitigating circumstances outweight [sic.] the aggravating circumstances, then you must bring in a verdict of life imprisonment.
>
> . . . .
>
> Under the law . . . you are obligated by your oath of office to fix the penalty at death if you unanimously agree and find beyond a reasonable doubt that there is an aggravating circumstances [sic.] and either no mitigating circumstance or that the aggravating circumstance outweighs any mitigating circumstances.

923 F.2d at 307-08.

In holding this charge to be constitutionally permissible under *Mills*, the court of appeals engaged in a sentence-level parsing of the language employed. It especially was interested in the phrase "if you unanimously agree and find," contained in the second stanza above. The words "agree and" were of particular import because they served as a linguistic buffer between the unanimity requirement and the enterprise of determining the existence of mitigating circumstances. 923 F.3d at 308. Accordingly, the court found that "the word 'unanimously' in the latter part of the charge modified only the word 'agree.'" *Frey*, 132 F.3d at 922 (citing *Zettlemoyer*, 923 F.2d at 308). The effect of this language was that "the [*Zettlemoyer*] instruction was reasonably likely to have been understood by the jury to have meant something akin to: you must fix the penalty at death if you unanimously agree to the ultimate conclusion that either there is an aggravating circumstance and no mitigating circumstances or that the aggravating circumstance outweighs any mitigating circumstances." *Id.* This, of course, is distinguishable from a requirement that the penultimate conclusion as to the existence of a particular mitigating circumstance be the product of unanimous assent.

The *Zettlemoyer* instruction also included other language that confirmed its constitutional validity. For example, the segment of the instruction set forth above was repeated later in the charge, but in this second articulation the word

"unanimously" was not employed. *See Frey*, 132 F.3d at 922 (highlighting this aspect of the *Zettlemoyer* charge). Moreover, in *Frey* the court found it significant that in this second repetition the *Zettlemoyer* charge "refer[ed] to aggravating circumstances outweighing 'any mitigating circumstance you may find.'" 132 F.3d at 922. Upon considering these additional interpretive indicia in conjunction with the linguistic point concerning the phrase "agree and find," the *Zettlemoyer* court concluded that the instruction in that case did not create a reasonable likelihood that the jury believed that unanimity was a prerequisite for finding any particular mitigating circumstance.

The *Zettlemoyer* court further held that the verdict form in that case also did not create such an impression. The form read:

> (1) We the jury unanimously sentence the defendant to: ___ death ___ life imprisonment.
>
> (2) (To be used if the sentence is death)
>
> We the jury have found unanimously:
>
> ___ at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance is _____.

___ the aggravating circumstance outweighs any mitigating circumstances.
The aggravating circumstance is
_____.

923 F.2d at 308. This sheet, the court held, "did not limit the mitigating circumstances that the jury could consider." 923 F.2d at 308. The court specifically focused upon the fact that "[alt]hough the jury was obliged to specify the aggravating circumstance it found, it had no such duty with respect to mitigating circumstances . . . ." *Id.* This "suggest[ed] that consideration of mitigating circumstances was broad and unrestricted," *id.*, and accordingly that the jury did not believe itself to be limited by the need for unanimity.

After thus considering both the verdict sheet and the instructions that accompanied it, the *Zettlemoyer* court concluded that "[n]either the court nor the verdict sheet stated that the jury must unanimously find the existence of particular mitigating circumstances or that the jury could weigh only those mitigating circumstances which it found unanimously. Thus *Mills* is clearly distinguishable." 923 F.2d at 308.

The Third Circuit next revisited *Mills* in a meaningful way in *Frey*. At first glance, the operative facts in *Frey* appear to be virtually indistinguishable from those in *Zettlemoyer*. Indeed, the *Frey* court was candid in its recognition that "the

verdict slip used in *Zettlemoyer* was substantially the same as the verdict slip used in the present case," 132 F.3d at 924, and that the instructions with which it was confronted were "similar in many respects to the charge at issue in *Zettlemoyer*." *Id.* at 922. Yet the court proceeded to make two points that are important from the perspective of the present determination. First, it reaffirmed that, in general terms, the impression that unanimity is required is generated by the combined effect of the jury charge and the verdict sheet. *Id.* (citing *Zettlemoyer*, 923 F.2d at 308 n.22). Accordingly, despite the similarities between the verdict forms, the *Frey* court held that "the discussion in *Zettlemoyer* regarding the propriety of the verdict slip is not controlling." 132 F.3d at 924. Second, and more importantly, the court held that although the *Frey* and *Zettlemoyer* charges were in many senses alike, the *Frey* instructions "differed significantly" from those evaluated in *Zettlemoyer*.

The court focused specifically on three aspects of the charge as creating the misimpression that all 12 jurors were obligated to agree as to the existence of any given mitigating circumstance. First, the *Frey* charge used the word "unanimously" "in close proximity to – within seven words of – the mitigating circumstances clause." 132 F.3d at 923 (quoting this portion of the charge: "if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance . . ."). The

effect of the temporal[86] proximity of these two concepts was the creation of "one sound bite" in which the requirement of unanimity and the enterprise of finding mitigating circumstances, to which that requirement does not rightfully apply, were joined. *Id.* Second, whereas the *Zettlemoyer* instruction employed the language "agree and find," the *Frey* charge omitted the words "agree and," leaving the complete phrase to read "unanimously finds . . . ." *See id.* Accordingly it could not be said, as it was in *Zettlemoyer*, that "unanimously" modified only "agree." Indeed, there was no defensible linguistic construction of the *Frey* instructions apart from the one ultimately endorsed by the court – the unanimity requirement pertained to the jury's task of determining the existence of mitigating circumstances. Third, other portions of the *Frey* instruction were more likely to heighten, rather than lessen, the panel's confusion. The court explained that "[u]nlike *Zettlemoyer*, where the court specifically instructed the jury that aggravating circumstances must be proven

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[86]The term "temporal," as opposed to "spatial," is used here because the court's concern – as it was in *Frey* – is with the effect created by the instructions when spoken, not as written. *See Frey*, 132 F.3d at 923 (discussing the effect of the instructions on "the ear and . . . the mind"). Because the jury was presented with the charge auditorily, the degree to which the unanimity requirement and mitigating circumstances clause were presented in close proximity to each other is a matter of temporal, not spatial closeness.

'unanimously, beyond a reasonable doubt,' the trial court here did not stress that the different burdens that attach to aggravating and mitigating circumstances also entail different unanimity requirements." *Id.* at 923-24. This, the court indicated, likely cemented the jury's mistaken impression that it was obligated *not* to consider a mitigating circumstance that was found to exist by anything other than the entire panel.

Based on these important distinctions between the linguistically similar charges in *Zettlemoyer* and *Frey*, the *Frey* court determined – as the *Mills* court had – that although it could not say with absolute certainty that the jury operated under the impression that unanimity was required to find a given mitigating circumstance, the instruction "create[d] a risk that the death penalty was imposed in spite of 'factors which may call for a less severe penalty.'" 132 F.3d at 924-25 (quoting *Mills*, 486 U.S. at 376). This risk was sufficient to require the vacatur of Frey's death sentence under the pre-AEDPA standards applied by the court of appeals in that case. *See id.*

The Third Circuit's decision in *Banks v. Horn*, ___ F.3d ___, 2001 WL 1349369 (3d Cir. Oct. 31, 2001) – a post-AEDPA case, like the one at bar – marks the court of appeals's most recent application of *Mills* and virtually compels the result reached here. In *Banks* the court held that the Pennsylvania Supreme Court had applied *Mills* in

an unreasonable fashion, and in so doing it again focused on both the jury instruction and the verdict sheet as sources of confusion over the unanimity requirement. It also addressed briefly the individual polling of the jurors as another potential source of confusion.

The *Banks* court commenced its analysis by examining the jury charge delivered by the trial court in that case, and by noting that the Pennsylvania Supreme Court did not undertake the sort of analysis of this instruction required by *Mills*. The state supreme court had held that "because the instruction 'mirrors the language found in the death penalty statute of our Sentencing Code [that] has previously been reviewed by this court and determined not to violate *Mills*,' Banks's claim was 'without merit.'" *Banks*, 2001 WL 1349369, at *13 (quoting *Commonwealth v. Banks*, 656 A.2d 467, 470 (Pa. 1995)). The problem with this approach was that the state supreme court failed to analyze the likely effect of the charge on the panel, specifically "whether a reasonable jury could have concluded from the instruction that unanimity was

required to find a mitigating circumstance." *Id.*[87] (citing *Mills*, 486 U.S. at 370).

The court of appeals undertook this appropriate inquiry by juxtaposing the instructions delivered by the trial court in *Banks* with those received by the jury in *Frey*. This comparison demonstrated that the relevant instructions in those cases were nearly verbatim replicas of each other, with any differences being purely semantic. Accordingly, the court had little difficulty concluding that the concern of jury confusion generated by the *Frey* charge was equally present in *Banks*, and thus that the result in the former dictated an analogous holding in the latter. *See id.* at *15 ("The instructions are in themselves ambiguous, allowing for a jury to infer that the requirement of

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[87]The Pennsylvania Supreme Court instead relied on its own precedents in concluding that Banks's sentencing proceedings comported with *Mills*. Yet as indicated by the Third Circuit, the court's task in conducting a federal habeas review is "not to ensure the consistency of the Pennsylvania Supreme Court's application of its law, but, rather, to assure proper application of the United States Supreme Court teachings." 2001 WL 1349369, at *12. Accordingly, the court is guided in this determination by *Mills* itself, and further by those interpretations of that holding that are binding on this court; namely, those of our court of appeals. *See, e.g., Banks*, 2001 WL 1349369, at *14 ("While . . . *Frey* does not control our holding here, nonetheless our reasoning there regarding the *Mills* implications of a very similar jury charge is instructive and applicable.").

unanimity applies both to aggravating and mitigating circumstances. There is no way that a juror would understand that a mitigating circumstance could be considered by less than all jurors."). Furthermore, while the trial court in *Banks* did differentiate between the "beyond a reasonable doubt" and "preponderance of the evidence" standards of proof that applied to aggravating and mitigating circumstances respectively, it notably failed to similarly distinguish between these contexts regarding the applicability of the unanimity requirement. As it had in *Frey*, *see* 132 F.3d at 923-24, the court of appeals found this aspect of the *Banks* charge to be indicative of a *Mills* violation. *See* 2001 WL 1349369, at *16.

As for the verdict slip in *Banks*, the Third Circuit found that the Pennsylvania Supreme Court again failed to undertake the analysis required by *Mills*. Specifically, the state supreme court did not assess whether "the need for a unanimous finding of mitigating circumstances is one that 'a reasonable jury could have drawn from . . . the verdict form employed.'" 2001 WL 1349369, at *17 (quoting *Mills*, 486 U.S. at 375-76). After indicating the impropriety of the state supreme court's approach, the court of appeals undertook a de novo analysis of the verdict sheet and determined that

"the form *does* suggest the need for unanimity." *Id.* at *17 (emphasis original).[88]

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[88]The verdict slip in *Banks* was analogous in structure to that at issue in *Mills*; both contained three sections, and in *Banks* each was presented on a separate page. The *Banks* form appeared as follows:

1. We the jury unanimously sentence the defendant in the above matter to
   _____ Death
   _____ Life Imprisonment

2. (To be completed if the Sentence is Death)
We the jury have found unanimously
   _____ At least one aggravating circumstance and no mitigating circumstances.

The aggravated circumstance(s)(is)(are):
1._____In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.
2._____The defendant has a significant history of felony convictions involving the use or threat of violence to the person.
3._____The defendant has been convicted of another federal or state offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of

(continued...)

[88](...continued)

the commission of the offense.

Or

_____ One or more aggravating circumstances which outweigh any mitigating circumstance or circumstances.

The aggravated circumstance(s)(is)(are):

1._____In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

2._____The defendant has a significant history of felony convictions involving the use or threat of violence to the person

3._____The defendant has been convicted of another federal or state offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

The mitigating circumstance(s)(is)(are):

1._____The defendant was under the influence of extreme mental or emotional disturbance.

2._____The capacity of the defendant to appreciate the criminality of his

(continued...)

In reaching this conclusion, the court focused primarily on the lead-in language to the second question. Because that question opened with the phrase "[w]e the jury have found unanimously," the court determined, "[b]y implication, everything that follow[ed] was found unanimously." 2001 WL 1349369, at *17. The court went on to explain that "[w]hat follow[ed was] a reference to both aggravating and to mitigating circumstances, with no additional language that would imply that there is a different standard for aggravating circumstances than there is for mitigating circumstances." *Id.* The court specifically noted the absence of affirmative language indicating that a mitigating circumstance could be found if only one juror believed it to exist. *See id.* at *18. These aspects of the verdict form, coupled with the jury charge, created a sufficient likelihood that the jury was confused as to the need for unanimity in the context of mitigating circumstances so as to render the sentencing

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[88](...continued)

conduct or to conform his conduct to the requirements of law was substantially impaired.

3._____Any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense.

Banks, 2001 WL 1349369, at *17 (emphasis added).

determination constitutionally defective under *Mills*.[89] *See id.*

This Legal Background as Applied to the Instant Matter

As in *Banks*, the Pennsylvania Supreme Court failed in this case to "really apply[ ] the teachings of *Mills*." *Banks*, 2001 WL 1349369, at *12. Indeed, the deficiency in the state supreme court's analysis of petitioner's *Mills* claim was more significant than that which marked its consideration in *Banks*. Whereas in *Banks* the court at least addressed the constitutional implications of the jury charge, it did not even address this issue in petitioner's case. Instead, the court proceeded as follows: it first indicated that the *Mills* claim was before it, and further recognized that in *Mills* the unconstitutional confusion was created by both the jury instructions and the verdict sheet. *Abu-Jamal*, 720 A.2d at 119. However, it then proceeded to evaluate only the verdict sheet, stating that "the crux of Appellant's argument on this point

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[89]As indicated above, the court also addressed the effect of the jury poll that had been conducted in *Banks*. Specifically, it concluded its analysis of Banks's sentencing determination by noting that although the Pennsylvania Supreme Court had devoted a majority of its opinion in *Banks* to the issue fo the effect of the jury poll, this endeavor neither "add[ed] to or reduce[d] the confusion as to the *Mills* problem . . . ." *Banks*, 2001 WL 1349369, at *18.

is that the structure of the form was such that the jury would be led to believe that unanimity was required in order to find, and thus consider, a mitigating circumstance."[90] *Id.* This repeats, albeit in starker form, the analytical error identified in *Banks*, in which the Third Circuit indicated that "[p]roper application of *Mills* requires at the outset that the reviewing court examine the entire jury instructions," and pose the "'critical question'" of whether the charge created a reasonable likelihood that the jury applied the instruction in a way that prevented the consideration of constitutionally relevant evidence. *Banks*, 2001 WL 1349369, at *13 (quoting *Mills*, 486 U.S. at 370); *see also Boyde*, 494 U.S. at 380. Clearly the failure to even evaluate the possibility that the jury charge confused the jury as to the existence of a unanimity requirement is a paradigmatic example of the "undert[aking of] a different inquiry from that required under *Mills*." *Id.* at *17.

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[90]As indicated *supra*, the Pennsylvania Supreme Court was not incorrect when it indicated that the crux of petitioner's *Mills* claim is that the verdict form was misleading. However, by asserting that "[t]he court's instructions . . . would have compounded that misunderstanding," P1 ¶ 602, petitioner has placed in issue the effect of both the verdict sheet and the instructions in this case. The state supreme court accordingly was incorrect insofar as it determined that the effect of the jury charge was not raised at all by petitioner.

Additionally, the Pennsylvania Supreme Court never mentioned, much less did it apply, the *Boyde* standard for evaluating claims pursuant to *Mills v. Maryland*. *See Abu-Jamal*, 720 A.2d at 119. Although the state supreme court did articulate the standard set forth in *Mills* itself – namely whether "the jury instructions, together with the verdict form, created a substantial probability that reasonable jurors may have believed that they were barred from considering mitigating evidence unless all twelve jurors agreed on the existence of any given circumstance," *id.* – this is significantly different from the standard articulated in *Boyde*. *See Frey*, 132 F.3d at 921 (distinguishing between the *Mills* and *Boyde* standards).

The jury charge in petitioner's case featured language that was equally, if not more, problematic than those at issue in *Banks* and *Frey*. The instruction began:

> Members of the jury, you must now decide whether the defendant is to be sentenced to death or life imprisonment. The sentence will depend upon your findings concerning aggravating and mitigating circumstances. The crimes code provides that a verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances

> which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

N.T. 7/3/82 at 90. The above portion of the charge is literally identical to that delivered in *Frey*, and functionally indistinguishable from the equivalent portion of the *Banks* instruction.

The court next discussed the status of a Philadelphia police officer as a "peace officer" within the meaning of aggravating circumstance "A," pertaining to the killing of a "fireman, peace officer or public servant . . . who was killed in the performance of his duties." First Degree Murder Penalty Determination Sheet, *Commonwealth v. Abu-Jamal*, No. 1358 Jan. Term, 1982 (Phila. Ct. Com. Pls. July 3, 1982) at 2. It then continued:

> The Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances, but only by a preponderance of the evidence. This is a lesser burden of proof than beyond a reasonable doubt. A preponderance of the evidence exists where one side is more believable than the other side. All the evidence from both sides, including the evidence you heard earlier during the trial-in-chief as to aggravating or mitigating circumstances is important and proper for you to consider.

You should not decide out of any feelings of vengeance or sympathy or bias towards the defendant.

Now, the verdict is for you, members of the jury. Remember and consider all of the evidence giving it the weight to which it is entitled. Remember that you are not merely recommending a punishment. The verdict you return will actually fix the punishment at death or life imprisonment. Remember again that your verdict must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be the verdict of each and every one of you.

Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances. Or, if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment.

N.T. 7/3/82 at 91-92.

The court then concluded its charge by informing the jury that its verdict would be recorded on a verdict sheet, and by reading the sheet aloud. In explaining the procedure properly followed in filling out the slip, the court indicated

that in the event the panel were to find (as it did not) the existence of at least one aggravating circumstance and no mitigating circumstance, it would find on page 2 of the form "all the aggravating circumstances. . . . Whichever one of these that you find, you put an "X" or check mark there and then put it in the front. Don't spell it out, the whole thing, just what letter you might have found ." *Id.* at 94. Were the jury to find instead one or more aggravating circumstances which outweigh any existent mitigating circumstances (as it did), the court explained, it should similarly

> indicate which [aggravating circumstances] they were and put it on the front here, like a small number or (A) or (B) or (C) or whatever one you might find.
>
> And then, underneath that, [the form states]: "The mitigating circumstances(s) is/are –"
>
> And those mitigating circumstances appear on the third page here. They run from a little (A) to a little letter (H). And whichever ones you find there, you will put an "X" mark or check mark and then, put it on the front here at the bottom, which says mitigating circumstances. And you will notice that on the third or last page, it has a spot for each and every one of you to sign his or her name on here as jurors and date it

> down on the bottom, the date that you reach the verdict, and return it to the Court with this verdict report.

Id. at 94-95.

There are numerous aspects of this charge that created a reasonable likelihood that the jury believed that it was obligated to consider only mitigating circumstances that were found to exist by a unanimous panel. First, unlike the *Zettlemoyer* instruction, nowhere in the *Jamal* charge are the words "agree and" found between the words "unanimously" and "find." Instead, the phrase "unanimously finds" was repeated four times by the trial court in this case. *Compare, e.g., Zettlemoyer*, 923 F.3d at 307-08 (restating the instruction that "you are obligated by your oath of office to fix the penalty at death if you *unanimously agree and find* beyond a reasonable doubt that there is an aggravating circumstances (sic) and either no mitigating circumstance or that the aggravating circumstance outweighs any mitigating circumstances") (emphasis added) *with* N.T. 7/3/82 at 90 ("The crimes code provides that a verdict must be a sentence of death if the jury *unanimously finds* at least one aggravating circumstance and no mitigating circumstance, or if the jury *unanimously finds* one or more aggravating circumstances which outweigh any mitigating circumstances.") (emphasis added). Accordingly, the only linguistically plausible conclusion is that the word "unanimously" modified "find" in the

Jamal instructions. As indicated above, when confronted with precisely this language the *Banks* and *Frey* courts found such to be telling evidence of a *Mills* violation. *See Banks*, 2001 WL 1349369, at *15 (adopting by reference the discussion of this language contained in *Frey*); *Frey*, 132 F.3d at 923.

Second, in *Zettlemoyer*, the instruction regarding the two conditions under which the death penalty could be imposed (i.e. were the jury to find an aggravating circumstance and no mitigating circumstance, or that the existent aggravating circumstances outweighed the mitigating circumstances) was repeated twice, the first time articulating the unanimity requirement and the second time with this requirement omitted. The court of appeals found that this second, error-free articulation lessened the likelihood of juror confusion. In *Jamal*, by contrast, while this instruction was repeated, its second articulation employed the unanimity language just as the first had. *See* N.T. 7/3/82 at 92 ("Remember that your verdict must be a sentence of death if you *unanimously find* at least one aggravating circumstance and no mitigating circumstances. Or, if you *unanimously find* one or more aggravating circumstances which outweigh any mitigating circumstances.") (emphasis added). Rather than alleviating the confusing effect of the first articulation, then, this second instruction reinforced it.

Third, because the portion of the *Jamal* charge in which the unanimity requirement was mentioned in close proximity to the mitigating circumstances clause was identical to its counterparts in *Frey* and *Banks*, the "sound bite" created was precisely the same. *See* N.T. 7/3/82 at 90 (". . . if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance . . ."); *Banks*, 2001 WL 1349369, at *14 (". . . if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances . . ."); *Frey*, 132 F.3d at 923 (". . . if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance . . ."). Indeed, as in *Banks* and *Frey*, the *Jamal* instructions featured the articulation of the unanimity requirement within seven words of the mitigating circumstances clause. Notably, the *Banks* court's reaffirmation of the concern expressed in *Frey* regarding the placement of the mitigating circumstances clause in close proximity to language indicating the need for unanimity reinforces that such constitutes strong evidence of a *Mills* violation. *See* 2001 WL 1349369, at *14-15. Moreover, given the subsequent repetition of this language in the charge in this case, *see* N.T. 7/3/82 at 92, petitioner's jury, unlike the panel in *Frey*, was subjected to this sound bite twice.

Fourth, while the charge in this case distinguished between the burdens of proof associated with aggravating and mitigating circumstances, as

in *Banks* the court did not indicate that different unanimity requirements also apply to these different types of circumstances. *See* 2001 WL 1349369, at *16 ("A reasonable juror could readily infer from the fact that the distinctions between the burden of proof were explained, but no mention was made of a distinction between a requirement of unanimity for a finding of aggravating circumstances and the requirement for mitigating circumstances, that the same requirement of unanimity applied."); *see also Frey*, 132 F.3d at 924 (noting that the jury charge in that case did not "stress that the different burdens . . . also entail different unanimity requirements."). In *Zettlemoyer*, by contrast, the court indicated to the jury that to find an aggravating circumstance, it had to do so "unanimously, beyond a reasonable doubt." It made no equivalent statement regarding mitigating circumstances. No such discrepancy was contained within the *Jamal* charge, and thus, as indicated in *Frey*, "[i]t is what is *not* said here that is significant." *Id.* at 923.

Indeed, in petitioner's case the jury's tasks of finding aggravating and mitigating circumstances generally were presented as being equivalent, the burden of proof distinction aside. This is further evidenced by the fact that, in explaining the verdict form, the court stated:

> Page 2 lists all the aggravating circumstances. They go from small letter (A) to small letter (J). Whichever one of these that

> you find, you put an "X" or check mark there and then, put it in the front. Don't spell it out, the whole thing, just what letter you might have found.
>
> ...
>
> [The] mitigating circumstances appear on the third page here. They run from a little (A) to a little letter (H). And whichever ones you find there, you will put an "X" mark or check mark and then, put it on the front here at the bottom, which says mitigating circumstances.

N.T. 7/3/82 at 94-95. As contrasted with the differential characterization of the jury's responsibilities in *Zettlemoyer*, the like treatment afforded the jury's tasks in this case increases rather than decreases the likelihood that the jury believed the unanimity requirement that applied to aggravating circumstances to be equally applicable in the context of mitigating circumstances.

Fifth, the need for unanimity in petitioner's case was reinforced by the following instruction: "Remember again that your verdict must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be the verdict of each and every one of you ." N.T. 7/3/82 at 92. This language specifically was identified in *Banks* as creating "'a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally

relevant evidence.'" 2001 WL 1349369, at *16 (quoting *Boyde*, 494 U.S. at 380). Moreover, this statement preceded immediately the second repetition of the above-described sound bite in which the unanimity requirement was articulated within seven words of the mitigating circumstances clause. This further indicates that there is a reasonable likelihood that the jury believed that this specific articulation of the unanimity requirement pertained to its task of finding mitigating circumstances.

Sixth, as indicated above, the charge in petitioner's case ended with the following language:

> [The] mitigating circumstances appear on the third page here. They run from a little (A) to a little letter (H). *And whichever ones you find there, you will put an "X" mark or check mark and then, put it on the front here at the bottom, which says mitigating circumstances. And you will notice that on the third or last page, it has a spot for each and every one of you to sign his or her name on here as jurors* and date it down on the bottom, the date that you reach the verdict, and return it to the Court with this verdict report.

N.T. 7/3/82 at 95 (emphasis added). This aspect of the charge, like some of those discussed previously, places in the closest temporal proximity the task of

finding the existence of mitigating circumstances and the requirement that each juror indicate his or her agreement with the findings of the jury. The Pennsylvania Supreme Court addressed the placement of the signature lines at the end of the third page of the verdict sheet, on which the mitigating circumstances were listed, and held that this was "of no moment since those signature lines naturally appear at the conclusion of the form and have no explicit correlation to the checklist of the mitigating circumstances." *Abu-Jamal*, 720 A.2d at 119. Whether or not this is so, the state supreme court's reasoning addresses the verdict form itself, not the court's explanation of that form. I express no opinion regarding the impression created by the appearance of 12 separate signature lines on the same page as the jury is required to indicate which, if any, mitigating circumstances it finds to exist. However, when articulated verbally in the court's charge, the proximity of these aspects of the verdict sheet do create at least an implicit correlation of the sort to which the state supreme court referred. Indeed, this aspect of the instructions indicates that there is a reasonable likelihood that the jury believed that it was precluded from considering mitigating circumstances that were not unanimously found to exist.

Seventh, the instruction in petitioner's case included no affirmative language indicating that a given mitigating circumstance could be considered by the panel even if it was not unanimously found

to exist. Like the preceding six factors, the absence of such language also is indicative of a *Mills* violation. *See Frey*, 132 F.3d at 923 n.5; *see also Banks*, 2001 WL 1349369, at *18 (so holding in the context of the verdict form).

As for the effect of the verdict sheet in petitioner's case, such also was held by the Pennsylvania Supreme Court not to violate *Mills*.[91] Yet there is no need for a novel, in-depth analysis of this form because, in a determinative respect, the slip used

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[91]In rejecting petitioner's argument regarding the verdict slip, the Pennsylvania Supreme Court essentially described the form, indicated the lack of printed instructions on its second and third pages, dismissed petitioner's contention regarding the presence of the 12 signature lines on the same page as the mitigating circumstances, and concluded that "[a]s such," no *Mills* violation was present. However, the court never addressed the effect of the lead-in language. Moreover, it never really engaged in any sort of detailed analysis of the likely perception by the jury of its task, as shaped by the verdict form. Accordingly, this analysis was inconsistent with that mandated by *Mills*. Because, contrary to the court's ultimate determination, application of both the *Boyde* standard and the substantive holdings in *Mills*, *Banks* and *Frey* would have yielded the conclusion that the verdict form did create a reasonable likelihood that the jury concluded that unanimity was required to find a particular mitigating circumstance, the state supreme court applied *Mills* unreasonably. *See Matteo*, 171 F.3d at 890.

was identical to that employed in Banks.[92] In both cases, the form first required the jury to indicate whether the punishment imposed was death or life imprisonment. If the space indicating death was marked, the jury was directed to proceed to the second section of the form where it was to indicate which aggravating and mitigating circumstances it had found to exist. Upon examining this section of the form, however, the *Banks* court found "it only reasonable to conclude that the form itself [was] at

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[92]In both cases, as well as in *Mills*, the verdict slip was comprised of three sections. In petitioner's case, as in *Banks*, each section occupied a different page. On the first page were two questions. The first was whether the punishment was to be death or life imprisonment, and the second, to be answered only in the event of a death sentence, queried whether this sentence resulted from a finding of at least one aggravating circumstance and no mitigating circumstance, or a finding that the existent aggravating circumstances outweighed the existent mitigating circumstances. The second section, on page 2, was simply a list of various aggravating circumstances, with a space next to each which was to be checked by the jury in the event that that particular circumstance was found to exist. The third section, on page 3, was the same as the second section, except that the listed circumstances were mitigating, and underneath the list were twelve signature lines and a date line, to be filled in upon the completion of the sentencing determination.

Notably, the sheet differed significantly from that used in *Zettlemoyer*, where the verdict form lack a space in which the jury was to specify the mitigating circumstance(s) it found to exist.

least confusing, and more likely suggestive, regarding the need for unanimity as to mitigating circumstances." 2001 WL 1349369, at *17. This determination was a product of the lead-in language to this section, which read: "[w]e the jury have found unanimously." *Banks*, 2001 WL 1349369, at *17; *see also* First Degree Murder Penalty Determination Sheet, *Commonwealth v. Abu-Jamal*, No. 1358 Jan. Term, 1982 (Phila Ct. Com. Pls. July 3, 1982) at 1 (featuring this same language). Specifically, the *Banks* court stated that because this unanimity language led into "the overarching second question . . . [b]y implication everything that follows was found unanimously. What follows is a reference both to aggravating and to mitigating circumstances, with no additional language that would imply that there is a different standard for aggravating circumstances than there is for mitigating circumstances." 2001 WL 1349369, at *17. Accordingly, it concluded that "the structure and form of the verdict slip itself r[an] afoul of the dictates of *Mills*." 2001 WL 1349369, at *18. This analysis applies with equal force to the verdict form in petitioner's case, as no curative language of the sort described in *Banks* is found in the *Jamal* charge either. Accordingly, the incompatibility between the verdict sheet and the mandates of *Mills* that

was found to exist in *Banks* is equally present here.[93]

To conclude, the jury charge and verdict form in this case created a reasonable likelihood that the jury believed that it was precluded from considering a mitigating circumstance that had not been found unanimously to exist. In the terms used by the *Banks* court, it is the case both that "the instructions are in themselves ambiguous, allowing for a jury to infer that the requirement of unanimity applies both to aggravating and mitigating circumstances," 2001 WL 1349369, at *16 and that "the structure and form of the verdict slip itself runs afoul of the dictates of *Mills*." *Id.* at *18. Yet the Pennsylvania Supreme Court failed even to address the *Boyde* standard or the consequence of the jury instructions in this case, much less to reach a reasonable conclusion regarding the effect of the *Jamal* charge, and compounded this error by unreasonably failing to perceive the probable impact of the verdict form on the jury's impression regarding the need for unanimity. Accordingly,

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[93]As in *Banks*, the jurors were polled individually following the announcement of the verdict in this case. *See* N.T. 7/3/82 at 98-101. I find that this procedure was unremarkable, and in no significant sense different from the polling that transpired in *Banks*. Accordingly, I conclude that the effect of the jury poll on the likelihood for juror confusion was negligible, as the *Banks* court found it to have been. *See* 2001 WL 1349369, at *18.

when considered in light of the *Boyde* standard, *Mills*, and the interpretations of *Mills* set forth in *Frey* and *Banks*, this court is compelled to conclude that the decision of the Pennsylvania Supreme Court in this case, "evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing [United States] Supreme Court precedent." *Matteo*, 171 F.3d at 890. Its decision was an objectively unreasonable application of federal law. By contrast, a reasonable application of this precedent necessarily yields the conclusion that the jury charge and verdict form produced a "reasonable likelihood that the jury has applied the . . . instruction [and form] in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380. Accordingly, the petition will be granted as to this claim.

D. Unreasonable Determination of Facts in Light of Evidence Presented

Petitioner does not identify with specificity any findings of fact regarding this issue which are unreasonable in light of the evidence presented.

E. Evidentiary Hearing

Although petitioner argues that an evidentiary hearing is mandatory on this claim, this request is moot given the claim's disposition.[94]

* * * *

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[94]Petitioner's claims 26 through 28 will not be evaluated because they are mooted by the disposition of his 25th claim.

(EXCERPT)

[J-121-1997]
IN THE SUPREME COURT
OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	**No. 119 Capital Appeal Dkt.**
	:	
Appellee	:	**Appeal from the Orders of the Court of Common Pleas of Philadelphia County**
v.	:	**entered on September 15, 1995; November 1, 1996; and July 24, 1997 at No. 1357**
MUMIA ABU-JAMAL, a/k/a WESLEY COOK	:	**January term 1982 denying post-conviction relief.**
Appellant	:	
	:	**SUBMITTED: September 2, 1997**
	:	

OPINION OF THE COURT

MR. JUSTICE CAPPY

DECIDED: October 29, 1998

* * * *

Appellant next submits that the penalty phase verdict slip was constitutionally defective pursuant to the dictates of *Mills v. Maryland*, 486 U.S. 367 (1988). The crux of Appellant's argument on this point is that the structure of the form was such that the jury would be led to believe that unanimity was required in order to find, and thus consider, a mitigating circumstance. Appellant's argument regarding the structure is:

> The jury's completed verdict form showed one aggravating circumstance and one mitigating circumstance. On the first page of the form, the jury had to identify any mitigators it weighed by filling in a blank. Then, on the third page of the form, the jurors were required to identify mitigators by putting a check mark on the page. All twelve jurors had to sign that page.

(Brief of Appellant at p. 114). Initially, we note that Appellant offered absolutely no evidence in support of this claim at the PCRA hearing.[46] His

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[46]Appellant submits that the PCRA court precluded expert testimony on this issue. Appellant here refers to the proffered testimony of one Professor John Lamberth who, according to the offer of proof, interviewed approximately thirty-five persons who had been jurors in death penalty

(continued...)

sole support appears to be the verdict slip itself; a copy of which he appends to his PCRA petition. This argument is without merit. In *Mills*, the Supreme Court vacated a sentence of death on the basis that the judge's instructions, together with the verdict form, created a substantial probability that reasonable jurors may have believed that they were barred from considering mitigating evidence unless all twelve jurors agreed on the existence of any given circumstance. The form employed in *Mills* contained printed instructions for both the section respecting aggravating circumstances and that for mitigating circumstances. These instructions were identical but for the respective burdens of proof. In both, the term "unanimously" was used. Compounding this was the judge's instruction which indicated that both aggravating and mitigating circumstances had to be unanimously found.

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[46](...continued)
cases before one particular judge, Judge Jackson. The offer of proof further provided that, as a result of those interviews, Dr. Lamberth had formed opinions about jurors in general. Apparently, it was proposed that he would testify regarding those opinions. The court precluded this testimony on the grounds that it was not only irrelevant, but also inadmissible. Not only was this proffered testimony irrelevant, but, as noted previously herein, a juror may not impeach or invalidate a verdict by his or her testimony. *Patrick*, *supra*. The court, thus, properly excluded this proffered testimony.

The verdict slip employed in the instant case consisted of three pages. The requirement of unanimity is found only at page one in the section wherein the jury is to indicate its sentence. The second page of the form lists all the statutorily enumerated aggravating circumstances and includes next to each such circumstance a designated space for the jury to mark those circumstances found. The section where the jury is to checkmark those mitigating circumstances found, appears at page three and includes no reference to a finding of unanimity. Indeed, there are no printed instructions whatsoever on either page two or page three. The mere fact that immediately following that section of verdict slip, the jurors were required to each sign their name is of no moment since those signature lines naturally appear at the conclusion of the form and have no explicit correlation to the checklist of mitigating circumstances. As such, we cannot conclude, as Appellant urges, that the structure of the form could lead the jurors to believe that they must unanimously agree on mitigating evidence before such could be considered. Moreover, verdict slips similar to that employed in the instant matter have been held by our court not to violate the dictates of *Mills*. *See e.g. Commonwealth v. Murphy*, 657 A.2d 927 (Pa. 1995).

* * * *

(EXCERPT)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA
TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH	:	**JANUARY TERM,**
OF PENNSYLVANIA	:	**1982**
V.	:	
WESLEY COOK	:	
a/k/a MUMIA ABU-	:	
JAMAL	:	**NO. 1357**

SABO, J. **SEPTEMBER 15, 1995**

FINDINGS OF FACT,
CONCLUSIONS OF LAW, & ADJUDICATION

* * * *

B15. **Claim That the Verdict Form Was Unconstitutional**

171. Petitioner fails to raise this claim at trial or on direct appeal. Therefore, this claim should be waived. As Petitioner has not overcome that procedural bar, the claim should be precluded

from PCRA review and may not be further considered. 42 Pa.C.S. § 9543(a)(3). The following discussion of the merits is undertaken in the alternative.

172. Petitioner claims the verdict form in this case violated the rule in the later-decided case of *Mills v. Maryland*, 486 U.S. 383 (1988). Petitioner offered no evidence with respect to this claim at the PCRA hearing.

173. The constitutionality of similar verdict forms, along with the instructions given here, has repeatedly been upheld. *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 306-308 (3rd Cir.) (*rehearing denied*), *cert. denied*, 502 U.S. 902, *rehearing denied*, 502 U.S. 1000 (1991); *Griffin v. Delo*, 33 F.3d 895, 905-906 (8th Cir. 1994) (rehearing and rehearing *en banc* denied) (instructions that jury must be unanimous as to the outcome of the weighing stage did not imply that jury must be unanimous in finding a mitigating circumstance); *Maynard v. Dixon*, 943 F.2d 407, 418-20 (4th Cir. 1991), *cert. denied*, 502 U.S. 1110 (1992) (instructions identical to those given here); *Commonwealth v. Travaglia*, 42 Capital Dkt. (Pa., June 23, 1995); *Commonwealth v. Tilley*, 528 Pa. 125, 595 A.2d 575 (1991); *Commonwealth v. Williams*, 524 Pa. 218, 570 A.2d 75 (1990); *Commonwealth v. O'Shea*, 523 Pa. 384, 567 A.2d 1023 (1989), *cert. denied*, 498 U.S. 881 (1990); *Commonwealth v. Billa*, 521 Pa. 168, 555 A.2d 835

(1989); *Commonwealth v. Frey*, 520 Pa. 338, 554 A.2d 27 (1989), *cert. denied*, 494 U.S. 1038 (1990).[40]

175 [sic: 174]. Petitioner failed to sustain his burden of proving the merits of this claim.

* * * *

---

[40]*See Battle v. Delo*, 19 F.3d 1547, 1560-1561 (8th Cir. 1994) (*rehearing en banc denied*) (alternative holding) (no error to charge that jury must return life sentence if it unanimously decided that one or more mitigating circumstances outweighed any aggravating ones); *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1208 (1994) (same: court charged that jury must unanimously find that aggravating circumstances outweighed "any" mitigating circumstances); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120-1121 (6th Cir 1990) (*en banc*) (rehearing and rehearing *en banc* denied), *cert. denied*, 499 U.S. 970 (1991) (same: court charged that jury must be unanimous in finding any aggravating circumstance but was silent on how many jurors had to find any mitigating circumstance); *DeShields v. Snyder*, 829 F.Supp. 676, 688-689 (D. Del 1993) (court instructed that jury must unanimously find that aggravating circumstances outweighed any mitigating circumstances).

(EXCERPT)

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA
CRIMINAL TRIAL DIVISION

- - - - - - - - - -

COMMONWEALTH	:	JANUARY TERM, 1982
	:	1357 - POSS. INSTRUMENT OF CRIME, GENERALLY
VS.		
	:	POSS. INSTRUMENT CRIME, CONCEALED WEAPON
MUMIA ABU-JAMAL	:	1358 - MURDER
	:	VOLUNTARY MANSLAUGHTER
	:	1359 - INVOLUNTARY MANSLAUGHTER

- - - - - - - - - -

JULY 3, 1982

COURTROOM 253, CITY HALL

- - - - - - - - - -

JURY TRIAL

- - - - - - - - - -

BEFORE: HONORABLE ALBERT F. SABO, J.

- - - - - - - - - -

PRESENT: JOSEPH McGILL, ESQUIRE
Assistant District Attorney
for The Commonwealth

ANTHONY JACKSON, ESQUIRE
Counsel for The Defense
(Court-Appointed)

MUMIA ABU-JAMAL, Defendant

* * * *

CHARGE OF THE COURT

HON. ALBERT F. SABO, J.

(CHARGE COMMENCED 12:22 P.M.)

THE COURT: Members of the jury, you must now decide whether the defendant is to be sentenced to death or life imprisonment. The sentence will depend upon your findings concerning aggravating and mitigating circumstances. The Crimes Code provides that a verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds

one or more aggravating circumstances which outweigh any mitigating circumstances.

The verdict must be a sentence of life imprisonment in all other cases.

The Crimes Code defines aggravating and mitigating circumstances. I will not go into detail on them because I will later explain to you this penalty sheet which will go out with you that lists all of the aggravating and mitigating circumstances.

I must, however, at this time instruct you as a matter of law that a policeman in the City of Philadelphia is in fact and in law a peace officer. Every state trooper throughout the Commonwealth of Pennsylvania, every police officer throughout the Commonwealth of Pennsylvania, and every deputy sheriff throughout the Commonwealth of Pennsylvania is in fact and in law a peace officer. A peace officer is one whose duty and obligation is to maintain order or peace, and who has the legal duty and obligation to make arrests. Therefore, a policeman in the City of Philadelphia is in fact and in law a peace officer.

I should note that that section indicates that he must be in the line of duty in the performance of his duties. Therefore, that section would not apply to a peace officer who might be on vacation or off duty socializing. It applies only if he is killed in the

performance of his duties. That means, he must be in uniform and actually on duty at the time.

The Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances, but only by a preponderance of the evidence. This is a lesser burden of proof than beyond a reasonable doubt. A preponderance of the evidence exists where one side is more believable than the other side. All the evidence from both sides, including the evidence you heard earlier during the trial-in-chief as to aggravating or mitigating circumstances is important and proper for you to consider. You should not decide out of any feelings of vengeance or sympathy or bias towards the defendant.

Now, the verdict is for you, members of the jury. Remember and consider all of the evidence giving it the weight to which it is entitled. Remember that you are not merely recommending a punishment. The verdict you return will actually fix the punishment at death or life imprisonment. Remember again that your verdict must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be the verdict of each and everyone of you.

Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating

circumstances. Or, if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment.

You will be given a verdict slip upon which to record your verdict and findings. I am holding in my hand that verdict report which will go out with you. You will see it has three pages. The first page says:

"We, the jury, having heretofore determined that the above-named defendant is guilty of murder of the first degree, do hereby further find that:

(1) We, the jury, unanimously sentence the defendant to - - "

And you have two blocks; one block says death, the other block says life imprisonment. Whichever unanimously you decide on, you will put an "X" in that block.

Now, under (2), it says:

"(To be used only if the aforesaid sentence is death.)"

That means, under number one, you have indicated death and you will put an "X" in there,

you would then have to fill out the number two portion. And that reads as follows:

"We, the jury, have found unanimously - - "

And the first block there says:

"At least one aggravating circumstance and no mitigating circumstance."

If that is the block, you put an "X" there and then, it says:

"The aggravating circumstance(s) is/are - - "

And what you do, you go to Page 2. Page 2 lists all the aggravating circumstances. They go from small letter (a) to small letter (j). Whichever one of these that you find, you put an "X" or check mark there and then, put it in the front. Don't spell it out, the whole thing, just what letter you might have found.

Now, the second block there says:

"One or more aggravating circumstances which outweigh any mitigating circumstances."

And then, it goes on to say:

"The aggravating circumstance(s) is/are - - "

And then, you would as I said before, on the second page indicate which ones they were and put it on the front here, like a small number or (a) or (b) or (c) or whatever one you might find. And then, underneath that, there are:

"The mitigating circumstances(s) is/are - - "

And those mitigating circumstances appear on the third page here, they run from a little (a) to a little letter (h). And whichever ones you find there, you will put an "X" mark or check mark and then, put it on the front here at the bottom, which says mitigating circumstances. And you will notice that on the third or last page, it has a spot for each and every one of you to sign his or her name on here as jurors and date it down on the bottom, the date that you reach the verdict, and return it to the Court with this verdict report.

(At 12:27 p.m. the Court concluded its Charge to the jury on the aggravating and mitigating circumstances.)

COURT CRIER: Everyone remain seated until the jury leaves the room.

(At 12:27 p.m. the jury exited the courtroom to begin its deliberations.)

(Whereupon the verdict report slip was examined by counsel for the defense and the district attorney.)

MR. JACKSON: Your Honor, may we see you at side-bar?

(The following colloquy occurred at side-bar.)

* * * *

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	JAN. TERM, 1982
	:	No. 1358.
vs.	:	
	:	TRIAL DIVISION
	:	CRIMINAL SECTION
MUMIA ABU-JAMAL	:	PHILADELPHIA

FIRST DEGREE MURDER VERDICT
PENALTY DETERMINATION SHEET

We, the jury, having heretofore determined that the above-named defendant is guilty of murder of the first degree, do hereby further find that:

(1) We, the jury, unanimously sentence the defendant to

/X/ death
/ / life imprisonment.

(2) (To be used only if the aforesaid sentence is death)

We, the jury, have found unanimously

/ / at least one aggravating circumstance and no mitigating

circumstance. The aggravating circumstance(s) is/are _____.

[X] one or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstance(s) is/are A _____. The mitigating circumstance(s) is/are A _____.

AGGRAVATING AND MITIGATING CIRCUMSTANCES

AGGRAVATING CIRCUMSTANCE(S):

(a) The victim was a fireman, peace officer or public servant concerned in official detention who was killed in the performance of his duties (✓)

(b) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or to be paid by another person for the killing of the victim ( )

(c) The victim was being held by the defendant for ransom or reward, or as a shield or hostage ( )

(d) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft ( )

(e) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses ( )

(f) The defendant committed a killing while in the perpetration of a felony ( )

(g) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense ( )

(h) The offense was committed by means of torture ( )

(i) The defendant has a significant history of felony convictions involving the use or threat of violence to the person ( )

(j) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was impossible or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense ( )

MITIGATING CIRCUMSTANCE(S):

(a) The defendant has no significant history of prior criminal convictions (✓)

(b) The defendant was under the influence of extreme mental or emotional disturbance ( )

(c) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired ( )

(d) The youth or advanced age of the defendant at the time of the crime ( )

(e) The defendant acted under extreme duress or acted under the substantial domination of another person ( )

(f) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts ( )

(g) The defendant's participation in the homicidal act was relatively minor ( )

(h) Any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense ( )

[Signature of Juror] Foreperson	[Signature of Juror]
[Signature of Juror]	[Signature of Juror]
[Signature of Juror]	[Signature of Juror]
[Signature of Juror]	[Signature of Juror]
[Signature of Juror]	[Signature of Juror]
[Signature of Juror]	[Signature of Juror]

DATED: July 3, 1982

(4)

NO. 08-652

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

JEFFREY A. BEARD, Secretary, Pennsylvania Department of Corrections, *et al.*,

Petitioners,

v.

MUMIA ABU-JAMAL,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF IN OPPOSITION

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February 13, 2009

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* Counsel of Record

CAPITAL CASE

QUESTIONS PRESENTED

Should this Court grant certiorari to review the constitutionality of jury instructions where those instructions have not been given in the last twenty years, where the District Court and Court of Appeals expressly identified and applied the correct rules of constitutional law in evaluating those instructions, where the District Court and Court of Appeals expressly identified and applied the correct rules of deference to the state courts under 28 U.S.C. § 2254(d) in determining that habeas relief is appropriate, and, where the issues for which the Commonwealth seeks review are unlikely to arise in many other cases?

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For the reasons stated herein, this Court should deny the Petition for Writ of Certiorari.[1]

STATEMENT OF THE CASE

A. State Court: Respondent, Mumia Abu-Jamal, was convicted of murder and sentenced to death in Philadelphia, Pennsylvania. The Pennsylvania Supreme Court affirmed on direct appeal, *Commonwealth v. Abu-Jamal*, 555 A.2d 846 (Pa. 1989) ("*Abu-Jamal-1*"), and denied state post-conviction relief, *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998) ("*Abu-Jamal-2*"). In the state post-conviction proceedings, Mr. Abu-Jamal exhausted a claim that the capital sentencing verdict form and oral instructions violated *Mills v. Maryland*, 486 U.S. 367 (1988), because they required the jury to unanimously find a mitigating circumstance before giving it effect in the sentencing decision.

B. Federal District Court: On federal habeas review, the District Court carefully considered the *Mills* claim, addressed it at length, found it meritorious, and granted relief from the death sentence. *See Abu-Jamal v. Horn*, 2001 WL 1609690 (E.D. Pa. Dec. 18, 2001) ("*Abu-Jamal-3*"), partially reproduced at App. 126-69. The District Court rejected Mr. Abu-Jamal's challenges to his conviction.

The District Court carefully discussed this Court's *Mills*-related precedent, including *Mills*, *McKoy v. North Carolina*, 494 U.S. 433 (1990), and *Boyde v. California*, 494 U.S. 370 (1990), as well as prior Third Circuit rulings on *Mills* claims. The District Court recognized that, under this Court's precedent and under Third Circuit precedent, the standard for evaluating whether jury instructions violate *Mills* is that described in *Boyde* – "whether there is a reasonable likelihood that the jury [as opposed to a reasonable individual juror] has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Abu-Jamal-3*, App. 128 (quoting *Boyde*, bracketed material in original). The District Court further explained:

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1. The Petition for Writ of Certiorari is referenced herein as "*Petition*." The Appendix to the *Petition* is cited as "App." Petitioners are referred to as "the Commonwealth." Transcripts in Pennsylvania are referred to as "Notes of Testimony" and cited herein as "NT." All emphasis is supplied unless otherwise indicated. Parallel citations are usually omitted.

> While the Third Circuit repeatedly has noted the applicability of the *Boyde* standard in assessing *Mills* claims, *see Banks v. Horn*, 271 F.3d 527, 2001 WL 1349369, at *16 (3d Cir. Oct.31, 2001) and *Frey v. Fulcomer* 132 F.3d 916, 921 (3d Cir.1997), the court of appeals also has at least mentioned an alternate, arguably less stringent standard for determining whether *Mills* has been violated. *See, e.g., Banks*, 271 F.3d 527, 2001 WL 1349369, at *13 ("Proper application of *Mills* requires at the outset that the reviewing court examine the entire jury instructions, posing the "critical question" whether a reasonable jury *could have concluded*... that unanimity was required to find a mitigating circumstance.") (emphasis added); *Frey*, 132 F.3d at 923 ("[W]e must determine whether it is reasonably likely that the jury *could have understood* the charge to require unanimity in consideration of mitigating evidence.") (emphasis added). There is no dispute, however – and indeed, both *Frey* and *Banks* make this point explicitly – that the standard to be applied to *Mills* claims is that articulated in *Boyde*. Accordingly, I am concerned in evaluating petitioner's *Mills* claim with whether there is "a *reasonable likelihood* that the jury *has* applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380 (emphasis added).

Abu-Jamal-3, App. 128 n.80.

Because the Pennsylvania Supreme Court denied the *Mills* claim on the merits, the District Court carefully applied the deferential standards of AEDPA's 28 U.S.C. § 2254(d) to the state court decision. The District Court first observed that, under AEDPA:

> A petitioner seeking a writ based on a claim that was both exhausted and adjudicated on the merits in the state courts may have his application granted only if the state court decision: (1) was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States"; (2) "involved an unreasonable application of" such established federal law; or (3) was the result of "an unreasonable determination of the facts in light of the evidence presented" in state court. § 2254(d). To clarify the circumstances in which the writ may be granted, it is necessary to review the parameters of these statutory phrases.

Abu-Jamal-3, 2001 WL 1609690 at *10 (footnote omitted).[2]

The District Court then described the interpretation given § 2254(d) by this Court in *Williams v. Taylor*, 529 U.S. 362 (2000) ("*Terry Williams*"):

> In *Terry Williams*, the Court explained that a state court decision falls within the prohibition of the "contrary to" clause if it is "substantially different from the relevant precedent" of the Supreme Court, or if it "applies a rule that contradicts the

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2. This part of *Abu-Jamal-3* is not included in the Commonwealth's Appendix.

governing law set forth" in Supreme Court opinions. *Terry Williams*, 529 U.S. at 405. "A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Id.* at 406. In other words, "[u]nder the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* at 412-13.

> [T]he Supreme Court . . . also addressed the proper standard of review under the "unreasonable application" clause. *See Terry Williams*, 529 U.S. at 407-13. The Court explained that "when a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case, a federal court applying § 2254(d)(1) may conclude that the state-court decision falls within the provision's "unreasonable application" clause." *Id.* at 409. The Court then cautioned federal habeas courts against insufficiently deferential review of state court decisions. "[A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* Moreover, "the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410 (emphasis in original). In short, "[u]nder the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principles from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. It is important to recognize that AEDPA requires of federal habeas courts greater deference to state court applications of law to fact than did prior law. *See id.* at 403-04 (discussing the AEDPA's restriction of independent federal review).

Abu-Jamal-3, 2001 WL 1609690 at *10-*11; *see also id.* at *107 ("Again, I stress that in *Terry Williams*, the Supreme Court explained that in making the unreasonable application inquiry, a federal habeas court should ask whether the state court's application of clearly established federal law was objectively unreasonable, which is different from an incorrect application of federal law. *See Terry Williams*, 529 U.S. at 409-10. . . . [T]he AEDPA standard requires federal habeas courts to give greater deference to state court applications of law to fact than did prior law.").

When the District Court specifically addressed the *Mills* claim, it again emphasized that it was applying the deferential standards of § 2254(d):

> The Pennsylvania Supreme Court identified the correct federal law as determined by the Supreme Court of the United States, *i.e.*, the *Mills* decision. As such, the state supreme court did not "apply a rule that contradicts the governing law set

forth" by the Supreme Court. *See Terry Williams*, 529 U.S. at 405. The issue, then, is whether there was an unreasonable application of *Mills*. . . .

Indeed, it is important to reiterate here that the standards under which [Mr. Abu-Jamal's] *Mills* claim must be evaluated are those set forth in the AEDPA. This is to be contrasted with the Third Circuit's analysis in *Frey*, which employed pre-AEDPA standards in determining whether a violation of *Mills* had been effected in that case. Therefore, habeas relief will not be warranted pursuant to *Mills* if it is merely the case that, had I evaluated [Mr. Abu-Jamal's] *Mills* claim *ab initio*, I would have found it to be meritorious. . . . Put differently, a significant degree of deference is due the state supreme court's application of federal law. Instead, if [Mr. Abu-Jamal] is to be granted a writ of habeas corpus pursuant to this claim, it must necessarily be the case that the Pennsylvania Supreme Court's determination *Mills* had not been transgressed was "contrary to," or "involved an unreasonable application of" the United States Supreme Court's decision in that case. *See* 28 U.S.C. 2254(d)(1); *Terry Williams*, 529 U.S. at 405.

However, given, that the propriety of habeas relief based on this claim turns on the application of law (*i.e.*, *Mills*) to facts, and that the facts of this case are materially distinguishable from those at issue in *Mills*—for example, the language employed by the verdict form and by the trial court in instructing the jury in [Mr. Abu-Jamal's] case diverges from that at issue in *Mills*—the "contrary to" standard for relief is inapplicable here. *See Terry Williams*, 529 U.S. at 406 ("[A] run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s "contrary to" clause."). Accordingly, the court will inquire whether the Pennsylvania Supreme Court, in denying [Mr. Abu-Jamal's] *Mills* claim, applied unreasonably that holding.

Abu-Jamal-3, App. 132-33 & n.82.

The District Court carefully applied the federal constitutional standards of *Mills* and *Boyde*, and found that the instructions given here violated the Eighth Amendment. The District Court carefully applied the deferential standards of § 2254(d) to the state court decision on the *Mills* claim, and found that it was an "unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States." Accordingly, the District Court vacated the death sentence. *Abu-Jamal-3*, App. 169.

C. **Third Circuit**: The Third Circuit unanimously affirmed the District Court's grant of sentencing relief on the *Mills* claim. *See Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008) ("*Abu-Jamal-4*"), App. 15-17, 66-83, 85 n.31. The Third Circuit found that the District Court had "thoroughly explored" the *Mills* claim in the District Court's lengthy and comprehensive opinion, *Abu-*

Jamal-4, App. 15; the Third Circuit then gave its own thorough analysis of the claim.

The Third Circuit, like the District Court, recognized that the proper standard for reviewing a *Mills* challenge to jury instructions is set forth in *Boyde*, and, like the District Court, it applied *Boyde* here:

> In *Mills*, the Court posed "[t]he critical question . . . whether petitioner's interpretation of the sentencing process is one a reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case." *Id.* at 375-76. In *Boyde v. California* 494 U.S. 370 (1990), the Supreme Court clarified the legal standard as "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380.

Abu-Jamal-4, App. 74-75; *see also id.*, App. 6 ("whether the jury charge and sentencing verdict sheet violated Abu-Jamal's constitutional rights under *Mills* . . . and *Boyde*"); *id*, App. 73 ("We must determine whether the Pennsylvania Supreme Court decision was unreasonable in light of *Mills* and *Boyde*"); *id.*, App. 66, 79-80 (noting that District Court properly applied *Mills* and *Boyde*); *id.*, App. 83 ("We conclude the Pennsylvania Supreme Court's decision was objectively unreasonable under the dictates of *Mills* and *Boyde*.").

The Third Circuit, like the District Court, also recognized and applied the deferential standards of § 2254(d):

> Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), a state prisoner's habeas petition must be denied as to any claim that was "adjudicated on the merits in State court proceedings" unless the adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) & (2). Under the "unreasonable application" prong of § 2254(d)(1), "the question . . . is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schriro v. Landrigan*, ___ U.S. ___, 127 S.Ct. 1933, 1939 (2007) (citing *Williams[]*, 529 U.S. [at] 410).

Abu-Jamal-4, App. 17;

> Our standard on collateral review is whether the state's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly es-

> tablished Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). AEDPA creates "an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings," and we are guided by the statute's "binding [] directions to accord deference."

Abu-Jamal-4, App. 55 (quoting and citing *Uttecht v. Brown*, 127 S.Ct. 2218, 2224 (2007); *Landrigan*, 127 S.Ct. at 1939; *Williams*, 529 U.S. at 413); *see also Abu-Jamal-4*, App. 51 (describing "AEDPA's deferential standard of review"); *id.*, App. 53 n.21 (noting the "deferential standards provided by AEDPA § 2254(d)"); *id.*, App. 72-73 ("Our review is limited to whether the Pennsylvania Supreme Court unreasonably applied *Mills*. *See* 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 405. . . . We must determine whether the Pennsylvania Supreme Court decision was unreasonable in light of *Mills* and *Boyde*.").

The Third Circuit carefully applied the federal constitutional standards of *Mills* and *Boyde*, and the deferential standards of § 2254(d), and concluded:

> We conclude the Pennsylvania Supreme Court's decision was objectively unreasonable under the dictates of *Mills* and *Boyde*. The jury instructions and the verdict form created a reasonable likelihood that the jury believed it was precluded from finding a mitigating circumstance that had not been unanimously agreed upon. Accordingly, we will affirm the District Court's grant of relief on this claim.

Abu-Jamal-4, App. 83.

The Commonwealth did not seek rehearing. The Commonwealth seeks this Court's review.[3]

SUMMARY OF REASONS FOR DENYING THE WRIT

This case was tried before *Mills v. Maryland* was decided, at a time when Pennsylvania's courts did not require a particular verdict form or jury instructions at capital sentencing. In response to *Mills*, the Pennsylvania Supreme Court issued new rules prohibiting use of the verdict form and instructions used herein and requiring new *Mills*-compliant forms and instructions. Thus, the verdict form and instructions used in this case have not been used in the last twenty years.

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3. The District Court and Third Circuit found the *Mills* claim is not procedurally barred and *Teague v. Lane*, 489 U.S. 288 (1989), is irrelevant because Mr. Abu-Jamal's conviction became final after *Mills* was decided. App. 67-71, 134-35. The Commonwealth does not challenge these rulings.

Mr. Abu-Jamal challenged the instructions given in his case under *Mills*. The Pennsylvania Supreme Court denied the *Mills* claim on the merits. On federal habeas review, the District Court and the Third Circuit expressly identified and applied the correct rules of constitutional law in evaluating the instructions, and found the instructions unconstitutional. The District Court and Third Circuit also expressly identified and applied the correct rules of deference to the state courts under AEDPA's 28 U.S.C. § 2254(d), and found that the state court's decision was an unreasonable application of clearly established Supreme Court law, warranting relief from the death sentence.

The Commonwealth request for certiorari should be denied. Certiorari review is not appropriate when, as here, "the asserted error consists of . . . the misapplication of a properly stated rule of law." Supreme Court Rule 10. Moreover, certiorari is also inappropriate because the issues for which the Commonwealth seeks review are not of "general importance." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). As stated above, the verdict form and instructions at issue here have not been used for twenty years, because the Pennsylvania Supreme Court barred them in response to *Mills*. Nor are the issues presented by the Commonwealth likely to arise in many other cases, because *Mills* does not apply retroactively and, thus, older cases that may involve forms and instructions similar to those used herein are unlikely to receive merits review. The Commonwealth's request for certiorari review of well-reasoned rulings by the District Court and the Third Circuit, on issues that are unlikely to arise in many other cases, should be denied.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE DISTRICT COURT AND UNANIMOUS THIRD CIRCUIT DID NOT ERR

A. The District Court and Third Circuit Did Not Err When They Unanimously Found That the Sentencing Verdict Form and Oral Instructions Violated *Mills*

Jury instructions that require the jury to unanimously find a mitigating circumstance violate the Eighth Amendment because they create a "barrier to the sentencer's consideration of all mitigating evidence." *Mills*, 486 U.S. at 375. Instructions violate *Mills* when, "viewed in the context of the overall charge," there is a "reasonable likelihood" that the jury interpreted the instructions as requir-

ing a unanimous mitigation finding. *Boyde*, 494 U.S. at 378, 380. The District Court and unanimous Third Circuit correctly found that the sentencing verdict form and oral instructions violated *Mills*.

1. **The form**: A single, the three-page verdict form was given to the jury. The form, as completed by the jury, states:

> We, the jury, having heretofore determined that the above-named defendant is guilty of murder of the first degree, do hereby further find that:
>
> (1) We, the jury, unanimously sentence the defendant to
> ☒ death
> ☐ life imprisonment.
>
> (2) (To be used only if the aforesaid sentence is death)
> We, the jury, have found unanimously
> ☐ at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance(s) is/are _____ _____.
> ☒ one or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstance(s) is/are __A_____.
> The mitigating circumstance(s) is/are _____A_____.
>
> - - -

This verdict form *plainly requires* the jury to find each mitigating circumstance *unanimously*, for several reasons. *See Abu-Jamal-3*, App. 148-52, 165-68; *Abu-Jamal-4*, App. 75-76, 80-81.

(a) The form opens with "*We, the jury*, having heretofore determined that the above-named defendant is guilty of murder of the first degree, *do hereby further find that*:" The form thus requires that *everything* marked on it must be *found by the jury that found Mr. Abu-Jamal guilty – i.e.*, the *unanimous jury*.

Page One of the form requires the jury to specify the sentence; requires the jury to specify that "[t]he aggravating circumstance(s) is/are _____"; and requires the jury to specify that "[t]he *mitigating circumstance(s)* is/are _____." Given the form's opening statement, that everything on the form must be *unanimously* found, the form thus requires that the sentence, the aggravating circumstances and the *mitigating* circumstances must be unanimously found. While the first two requirements are proper, the third violates *Mills*.

Pages Two and Three of the form list ten aggravating circumstances and eight mitigating circumstances with a "( )" next to each to be checked if it is found. Given the form's opening statement, which tells the jury to mark only items that it unanimously finds, the form thus specifies that the jury is to find an aggravating or *mitigating* circumstance only if it is *unanimously* found. While the first requirement is proper, the second violates *Mills*.

(b) The form has an additional express unanimity requirement on Page One:

> We, the jury, have found *unanimously*
> ☒ one or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstance(s) is/are A.
> *The mitigating circumstance(s) is/are* A.

Thus, the form requires the jury to consider only the aggravating and *mitigating* circumstances that it has "found *unanimously*." While the first requirement is proper, the second violates *Mills*.

(c) Page Three of the form, just below the list of mitigating circumstances, requires the signatures of *all twelve jurors*. Again, this ensures that only *unanimously* found mitigat-

ing circumstances are considered. If fewer than twelve jurors found a mitigating circumstance, checked it on the checklist on Page Three (despite the fact that the form opens with a requirement that only findings of the *unanimous jury* be recorded), and wrote it on Page One (despite the fact that Page One says "We the jury have found *unanimously* . . . [t]he mitigating circumstance(s) is/are _____"), then the jurors that disagreed *could not sign the verdict form without violating their oaths*. The presence of all twelve signatures confirms that the jury considered only the mitigating circumstance that it unanimously found.

(**d**) Unanimity for finding a mitigating circumstance is also required by the form's everywhere *identical treatment* of aggravating and mitigating circumstances. To comply with *Mills*, the jury would have to *ignore* this and assume, *contrary to the form's plain language* and *without any rational basis*, that aggravation and mitigation should be treated *differently*. A court cannot assume that the jury treated aggravating and mitigating circumstances differently. Instead, the court must "presume that, unless instructed to the contrary, the jury would read similar language throughout the form consistently." *Mills*, 486 U.S. at 378. Thus, the identical treatment of aggravating and mitigating circumstances confirms that *both* must be unanimously found.

(**e**) The specific findings recorded on the form by the jury further highlight the *Mills* violation.

Trial counsel argued for several mitigating circumstances, under 42 Pa.C.S. § 9711(e): Mr. Abu-Jamal had no prior convictions and, thus, had "no significant history of prior criminal convictions," (e)(1); Mr. Abu-Jamal was "under the influence of extreme mental or emotional disturbance," (e)(2), as a result of seeing the decedent beating Mr. Abu-Jamal's brother; Mr. Abu-Jamal's age (27 years) at the time of the offense, (e)(4); and "other evidence of mitigation concerning the character and record of the defendant," (e)(8), based upon testimony from fifteen defense witnesses, *see* NT 6/30/82 at 17-50, 125-56; NT 7/1/82 at 3-31, regarding Mr. Abu-Jamal's good character and history of concern for and assistance to Philadelphia's African-American community. *See* NT 7/3/82 at 38-

The (e)(1) mitigating circumstance ("no significant history of prior criminal convictions") was *not disputed* by the Commonwealth and was present as a matter of law because Mr. Abu-Jamal had no prior convictions. However, the Commonwealth vigorously disputed the *other* mitigating circumstances – (e)(2), (e)(4) and (e)(8) – that were argued by counsel.

The jury's mitigation findings were *exactly* what one would expect, given the *Mills* violation. The jury *unanimously found* the (e)(1) mitigating circumstance, as it *had to*. But the jury did *not* unanimously find the other, *disputed*, mitigating circumstances. The jury's specific findings thus confirm that there is a reasonable likelihood that the jury understood the verdict form and instructions in a way that violated *Mills*.

(f) Further confirmation that the *Abu-Jamal* form violated *Mills* is found in the similarity between the *Abu-Jamal* form and the form used in *Mills*, 486 U.S. at 384-89, which contained a similar checklist of mitigating circumstances. If anything, the *Abu-Jamal* form was even *more likely* to be understood as requiring a unanimous mitigation finding than was the *Mills* form.

The *Mills* form gave the jury the choice of marking "yes" or "no" for each listed mitigating circumstance, and the list was prefaced with: "[W]e unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist by a preponderance of the evidence and each mitigating circumstance marked 'no' has not been proven by a preponderance of the evidence." *Id.*, 486 U.S. at 387 (capitalization altered).

Maryland's high court interpreted the jury's "no" entries on the form as showing that the jury *unanimously rejected* the "no"-marked mitigating circumstance. *See id.*, 486 U.S. at 372. So-interpreted, the death sentence was *constitutional* – if the jury *unanimously rejected* each mitigating circumstance, no juror was prevented from giving effect to mitigation that s/he believed to exist.

This Court found the Maryland court's interpretation of the *Mills* form "plausible" in light of the form's language ("we unanimously find that . . . each mitigating circumstance marked 'no' has

not been proven by a preponderance of the evidence"). *Id.*, 486 U.S. at 377. The death sentence was nevertheless unconstitutional because it was not clear that the *jury* gave the form the same interpretation as did the Maryland court. *See id.* at 375-76.

The *Abu-Jamal* form is not even susceptible to the "plausible" saving-interpretation that the Maryland court gave the *Mills* form. In *Mills*, the jury marked each mitigating circumstance "yes" or "no," and a "no" mark was plausibly interpreted as a *unanimous rejection* of the mitigating circumstance. Here, the jury's options were to check a mitigating circumstance if it was found, or *leave it blank*, and the failure to check cannot plausibly be interpreted as a unanimous rejection. Instead, it signifies the jury's failure to *unanimously find* a mitigating circumstance. Thus, the Mills violation is even more clear in *Abu-Jamal* than in *Mills*.

(g) The Pennsylvania Supreme Court responded to *Mills* by issuing a new standard capital sentencing verdict form. The differences between the post-*Mills* standard form and the *Abu-Jamal* form further highlight the *Mills* violation herein.

At the time of Mr. Abu-Jamal's sentencing, before *Mills*, Pennsylvania did not require trial courts to use a particular sentencing verdict form. In response to *Mills*, on February 1, 1989, the Pennsylvania Supreme Court issued new rules which, for the first time, required trial courts to use a standard form. Since then, Pennsylvania's Rules of Criminal Procedure require that, "[i]n all cases in which the sentencing proceeding is conducted before a jury, the judge shall furnish the jury with a jury sentencing verdict slip in the form provided by Rule 808." Rule 807(A)(1).

The post-*Mills* form required by Rules 807 and 808 was designed to comply with *Mills*. It specifies that aggravating circumstances must be unanimously found, and a death sentence must be unanimous, but mitigating circumstances may be found by "one or more" of the jurors:

A. We, the jury, unanimously sentence the defendant to (check one):
___ Death
___ Life Imprisonment

B. The findings on which the sentence of death is based are (check one):

____ 1. At least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance(s) unanimously found (is) (are): """""

____ 2. One or more aggravating circumstances which outweigh(s) any mitigating circumstance(s).

The aggravating circumstance(s) unanimously found (is) (are): _____

The *mitigating circumstance(s) found by one or more of us* (is) (are): ___ __

C. The findings on which the sentence of life imprisonment is based are (check one):

____ 1. No aggravating circumstance exists.

____ 2. The mitigating circumstance(s) (is) (are) not outweighed by the aggravating circumstance(s).

The *mitigating circumstance(s) found by one or more of us* (is) (are): _____

The aggravating circumstance(s) unanimously found (is) (are): _____

_____ DATE _____JURY FOREPERSON

Rule 808. Thus, the post-*Mills* form makes clear that any individual juror can find and consider a mitigating circumstance, even if no other juror agrees.

In *Mills*, this Court described similar verdict form changes made by the Maryland court, and concluded: "We can and do infer from these changes at least *some* concern on the part of that court that juries could misunderstand the previous instructions as to unanimity and the consideration of mitigating evidence by individual jurors." 486 U.S. at 382 (emphasis in *Mills*). Similarly, here, the Pennsylvania Supreme Court's post-*Mills* adoption of a verdict form that is significantly different from the *Abu-Jamal* form further highlights the existence of a *Mills* violation herein.

(h) In short, the *Abu-Jamal* verdict form *plainly requires* that mitigating circumstances be *unanimously* found. There is more than a "reasonable likelihood" that the form was understood in a *Mills*-violating way – the jury would have to *disobey the form's plain language and structure* in order to comply with *Mills*.

2. The oral instructions: Since the verdict form violates *Mills*, this death sentence is unconstitutional unless the oral instructions somehow cured the error by making the jury understand the form as meaning something other than what its plain language states. Nothing in the oral instructions even comes close to doing so. Instead, the oral instructions *compound* the *Mills* error. *See*

Abu-Jamal-3, App. 154-65, 168; *Abu-Jamal-4*, App. 76-78, 81-82.[4]

(a) The oral instructions on how to use the form compound the form's *Mills* error.

The judge first stated: "You will be given a verdict slip upon which to record your verdict and findings." App. 182. Here, and throughout, the judge made *no distinction* between "findings" of aggravating circumstances and "findings" of mitigating circumstances (except for different burdens of proof, *see infra*); thus, the jury had no reason to believe there was any difference (except for different burdens of proof)—both must be unanimous.

The judge then instructed on how to use the checklist of aggravating circumstances on Page Two and complete Page One where it says "[t]he aggravating circumstance(e) is/are _____":

> [W]hat you do, you go to Page 2. Page 2 lists all the aggravating circumstances. They go from small letter (a) to small letter (j). Whichever one of these that you find, you put an "X" or check mark there and then, put it in the front. Don't spell it out, the whole thing, just what letter you might have found.

App. 183.

The judge then used *materially identical language* regarding how to use Page Three's checklist of *mitigating* circumstances and how to complete Page One where it says "[t]he *mitigating* circumstance(e) is/are _____":

> [T]hose mitigating circumstances appear on the third page here. They run from a little (a) to a little letter (h). And whichever ones you find there, you will put an "X" mark or check mark and then, put it on the front here at the bottom, which says mitigating circumstances. And you will notice that on the third or last page, it has a spot for each and every one of you to sign his or her name on here as jurors . . . .

App. 184.

These instructions treat aggravating and mitigating circumstances *identically* as things to be

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4. Mr. Abu-Jamal need not establish that the oral instructions violated *Mills*; it is sufficient to show that they did not *cure* the form's *Mills* error. Nevertheless, the oral instructions *did* violate *Mills*, as set forth below.

"found" and recorded by the *unanimous jury*. The instructions do not even hint that an aggravation finding must be unanimous but a mitigation finding need not be. And the last instruction on finding mitigating circumstances and signing the form "places in the closest temporal proximity the task of finding the existence of mitigating circumstances and the requirement that each juror indicate his or her agreement with the findings of the jury" by signing the form. *Abu-Jamal-3*, App. 163-64. These instructions thus show "a reasonable likelihood that the jury believed that it was precluded from considering mitigating circumstances that were not unanimously found to exist." *Id.*, App. 164. The instructions on how to use the form thus contribute to the form's *Mills* error.

(b) The judge also instructed:

> Members of the jury, you must now decide whether the defendant is to be sentenced to death or life imprisonment. The sentence will depend upon your findings concerning aggravating and mitigating circumstances. The Crimes Code provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.
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> . . . .
>
> Remember, that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstance. Or, if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment.

App. 179-82.

Because these instructions "used the word 'unanimously' 'in close proximity to . . . the mitigating circumstances clause' . . . [,] [t]he effect of the temporal proximity of these two concepts was the creation of 'one sound bite' in which the requirement of unanimity and the enterprise of finding mitigating circumstances, to which that requirement does not rightfully apply, were joined." *Abu-Jamal-3*, App. 143-44 (footnote omitted).

Moreover, here and throughout, the instructions treat aggravating and mitigating circumstances *identically* and the jury had no reason to treat them differently. In short, "there was no de-

fensible linguistic construction of the[se] . . . instructions apart from [a conclusion that] the unanimity requirement pertained to the jury's task of determining the existence of mitigating circumstances," in violation of *Mills*. *Abu-Jamal-3*, App. 144.

(c) The judge also instructed on the different burdens of proof for aggravating and mitigating circumstances:

> Whether you sentence the defendant to death or to life imprisonment will depend upon what, if any, aggravating or mitigating circumstances you find are present in this case. . . . Aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt, while mitigating circumstances must be proved by the defendant by a preponderance of the evidence.
>
> . . . .
>
> The Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances, but only be a preponderance of the evidence. This is a lesser burden of proof than beyond a reasonable doubt.

App. 181.

Since the instructions stressed the different *burdens* for proving aggravating and mitigating circumstances, but were otherwise silent as to any differences in the *manner* of proof, jurors would naturally conclude that *both* "aggravating *and* mitigating circumstances must be discussed and unanimously agreed to, as is typically the case when considering whether a burden of proof has been met." *Frey v. Fulcomer*, 132 F.3d 916, 924 (3d Cir. 1997). "Such an understanding . . . is plainly inconsistent with the requirements of *Mills*," and "adds to [the] concern that the jury could have understood the charge to require unanimity in consideration of mitigating evidence." *Frey*, 132 F.3d at 924. In short, the burden of proof instructions "likely cemented the jury's mistaken impression that it was obligated *not* to consider a mitigating circumstance that was found to exist by anything other than the entire panel." *Abu-Jamal-3*, App. 145 (emphasis in *Abu-Jamal-3*); *see also Abu-Jamal-4*, App. 81-82 (same conclusion).

(d) Throughout the instructions, the pronoun "you" was used to refer without distinction to the entity that reaches a guilty verdict, that sentences, that "finds" aggravating circum-

stances, and that "finds" mitigating circumstances.[5] To reach a *Mills*-compliant understanding of the instructions, the jury would have to know that "you" meant the *unanimous jury* for the first three matters, but meant *each individual juror* for the last. But *nothing* in the instructions even remotely suggested that. The "natural interpretation," *Mills*, 486 U.S. at 381, of the instructions was that the same "you"—the unanimous jury—did all of these things.

(e) After *Mills*, Pennsylvania's standard instructions were changed, as was the verdict form, *see supra*. The post-*Mills* standard instructions state, *inter alia*:

> [Y]ou are to regard a particular aggravating circumstance as present only if you all agree that it is present. On the other hand, each of you is free to regard a particular *mitigating* circumstance as present despite what other jurors may believe. This is different from the general findings to reach your ultimate sentence of either life in prison or death. The specific findings as to any particular aggravating circumstance must be unanimous. All of you must agree that the Commonwealth has proven it beyond a reasonable doubt. That is not true for any mitigating circumstance. Any circumstance that any juror considers to be mitigating may be considered by that juror in determining the proper sentence.

Pennsylvania Suggested Standard Criminal Jury Instruction 15.2502H (emphasis in original). This post-*Mills* change to the instructions, like the post-*Mills* change to the verdict form, confirms that the instructions given here violated *Mills*. *Id.*, 486 U.S. at 382.

(f) In short, the oral instructions violated *Mills*; they did *not* cure the form's *Mills* error.

B. The District Court and Third Circuit Did Not Err When They Unanimously Found That Relief Is Appropriate under § 2254(d)

The District Court and Third Circuit correctly found that the state court decision denying this claim was objectively unreasonable under clearly established Supreme Court law, requiring habeas

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5. In addition to the instructions already quoted, *see* NT 7/3/82 at 2-3 ("Ladies and gentlemen of the jury, *you* have found the defendant guilty of murder in the first degree, and *your* verdict has been recorded. We are now going to hold a sentencing hearing during which . . . *you* will decide whether the defendant is to be sentenced to death or life imprisonment. Whether *you* sentence the defendant to death or life imprisonment will depend upon what, if any, aggravating or mitigating circumstances *you* find are present in this case."). Again, there is *no distinction* between guilt-finder, sentence-finder and finder of aggravating and *mitigating* circumstances.

relief under AEDPA's § 2254(d)(1). In fact, the state court decision is both "contrary to" and "an unreasonable application of" this Court's clearly established law, for several reasons.

1. In denying relief, the Pennsylvania Supreme Court first complained that Mr. Abu-Jamal "offered absolutely no evidence in support of this claim at the PCRA hearing." *Abu-Jamal-2*, App. 172. It is contrary to clearly established law, including *Mills*, to denigrate a challenge to a *jury instruction* because the defendant has not presented "evidence" to support the claim. *Mills*, 486 U.S. at 381 ("There is, of course, *no extrinsic evidence* of what the jury in this case actually thought. We have before us only the verdict form and the judge's instructions."); *Kelly v. South Carolina*, 534 U.S. 246, 256 (2002) ("Time after time appellate courts have found jury instructions to be insufficiently clear without any record that the jury manifested its confusion"). Here, as in *Mills* and most other cases challenging jury instructions, the claim is based upon "the verdict form and the judge's instructions." 486 U.S. at 381. The Pennsylvania Supreme Court's belief that the claim fell short because Mr. Abu-Jamal did not present "evidence" is contrary to this clearly established law.

2. Regarding the verdict form, the Pennsylvania Supreme Court noted that it "consisted of three pages" and stated (we have lettered each sentence for future reference):

> [a] The requirement of unanimity is found only at page one in the section wherein the jury is to indicate its sentence. [b] The second page of the form lists all the statutorily enumerated aggravating circumstances and includes next to each such circumstance a designated space for the jury to mark those circumstances found. [c] The section where the jury is to checkmark those mitigating circumstances found, appears at page three and includes no reference to a finding of unanimity. [d] Indeed, there are no printed instructions whatsoever on either page two or page three. [e] The mere fact that immediately following that section of verdict slip, the jurors were required to each sign their name is of no moment since those signature lines naturally appear at the conclusion of the form and have no explicit correlation to the checklist of mitigating circumstances. . . . [f] Moreover, verdict slips similar to that employed in the instant matter have been held by our court not to violate the dictates of *Mills*. *See e.g. Commonwealth v. Murphy*, 657 A.2d 927 (Pa. 1995).

Abu-Jamal-2, App. 174. The Court said *nothing* about the trial judge's oral instructions.

This treatment of the verdict form is unreasonable for several reasons.

(a) The Pennsylvania Supreme Court's claim that the "requirement of unanimity

is found only at page one in the section wherein the jury is to indicate its *sentence*" is contrary to the record. In addition to stating "We, the jury unanimously *sentence* the defendant to death," Page One of the form also states:

> We, the jury, have found *unanimously* . . .
> The aggravating circumstance(s) is/are ____A____.
> The *mitigating circumstance(s) is/are* ____A____.

Thus, Page One's "requirement of unanimity" *expressly applied* to both aggravating and *mitigating* circumstances.

Moreover, in addition to this express use of the word "unanimously," the form opens with the requirement that *everything on the form* must be the "find[ings]" of "the jury" that found Mr. Abu-Jamal guilty – *i.e.*, the *unanimous* jury. This applies to Page One's finding that the "*mitigating* circumstance(s) is/are """ and Page Three's checklist of *mitigating* circumstances *just as clearly* as it applies to Page One's finding that the "aggravating circumstance(s) is/are """ and Page Two's checklist of aggravating circumstances. Moreover, the form closes with a requirement that *all twelve jurors* sign it, reinforcing the form's opening statement that all findings – including mitigating circumstances – must be by the unanimous jury. The Pennsylvania Supreme Court, however, "never addressed the effect of the lead-in language." *Abu-Jamal-3*, App. 165 n.91.

The Pennsylvania Supreme Court simply ignored these ways (and others, described herein) in which the form imposed a "requirement of unanimity"; thus, the Pennsylvania Supreme Court unreasonably applied *Mills*. *See Williams*, 529 U.S. at 397-98 (state court decision "unreasonable insofar as it failed to evaluate the totality of" relevant facts).

(b) The Pennsylvania Supreme Court correctly stated that Page Two "lists all the . . . aggravating circumstances and includes next to each such circumstance a designated space for the jury to mark those circumstances found" – *i.e.*, an aggravating circumstance was checked on Page Two only if the "*the jury*," not an *individual juror*, "found" it. This is a proper requirement. What the Pennsylvania Supreme Court unreasonably failed to recognize is that the list of *mitigating* cir-

cumstances on Page Three is *identical* in format to the aggravating circumstances list. Thus, it was natural for the jury to believe that mitigating circumstances, like aggravating circumstances, must be *unanimously* found, in violation of *Mills*. The jury had no reason to believe it should treat the list of mitigating circumstances any differently than the list of aggravating circumstances.

(c) The Pennsylvania Supreme Court also unreasonably applied *Mills* when it relied on the fact that Page Three, which has the mitigating circumstances checklist, "includes no reference to a finding of unanimity." As stated above, the form opens with a requirement that *everything* thereon be found by the *unanimous* jury; the form ends – on Page Three itself, just below the checklist of mitigating circumstances – with a requirement that all twelve jurors sign, indicating their *unanimous* agreement with *everything* on the form; the form treats aggravating and mitigating circumstances identically. This shows, at least, a reasonable likelihood that the jury believed it had to unanimously find a mitigating circumstance. Indeed, Page Two, the aggravating circumstances list, is just as bereft of a "reference to a finding of unanimity" as Page Three, yet it is undisputed that the jury knew it had to find aggravating circumstances unanimously.

Even the *Pennsylvania Supreme Court's own description* of Page Three shows that Page Three, in the context of entire form, requires unanimity for finding a mitigating circumstance. As the Pennsylvania Supreme Court stated, Page Three is the "section where *the jury* is to checkmark those mitigating circumstances *found*." *Abu-Jamal-2*, App. 174. There is, at least, a reasonable likelihood that the jury understood Page Three in exactly that way – only mitigating circumstances "*found*" *by* "*the jury*," not by *individual jurors*, should be considered. To use Page Three in a way that satisfies *Mills*, the jury would have to know that *each juror* should check those mitigating circumstances *found by him or her*, even if the other jurors disagreed. To say the least, that is an odd reading of the form. And the jury would have to give this strange treatment to mitigating circumstances but *not* aggravating circumstances, despite the fact that aggravating and mitigating circumstances are treated identically on the form.

(d) The Pennsylvania Supreme Court noted that "there are no printed instructions whatsoever on either page two [listing aggravating circumstances] or page three [listing mitigating circumstances]" of the form, but the Pennsylvania Supreme Court unreasonably failed to recognize that this *contributes to* the *Mills* error. Because there are no printed instructions on the pages listing the aggravating and mitigating circumstances, the jury had to look to the other parts of the form, the overall structure of the form, and the oral instructions to understand what to do with those lists. As set forth herein, all of those factors – *e.g.*, the identical treatment, apart from burdens of proof, of aggravating and mitigating circumstances; Page One's opening requirement that everything on the form must be unanimously found; Page One's requirement that the jury record only the "aggravating circumstance(s)" and "*mitigating circumstance(s)*" that "We, the jury, have found *unanimously*"; Page Three's requirement that all twelve jurors show their agreement to the findings by signing the form; and the oral instructions on how to use the form—indicated that both aggravating and mitigating factors must be unanimously found.

(e) The Pennsylvania Supreme Court also unreasonably applied *Mills* when it said Page Three's signatures-of-all-jurors requirement "is of no moment since those signature lines naturally appear at the conclusion of the form and have no explicit correlation to the checklist of mitigating circumstances." The reason it is "natural[]" for the twelve signatures to "appear at the conclusion of the form" is that it *signifies the agreement of all twelve jurors* to the *findings recorded on the form*. This is especially obvious here, where the form *opens* with a requirement that everything thereon be the findings of the *jury*, not individual jurors.

To the extent the signatures "have no explicit correlation to the checklist of mitigating circumstances," *exactly the same* is true for the checklist of *aggravating circumstances* and the *sentence*. To satisfy *Mills*, the jurors would have to know that signing the form signaled *agreement* to the sentence and *agreement* to the findings of aggravating circumstances, but was *meaningless* with respect to mitigating circumstances. Nothing in the form or instructions conveyed that bizarre con-

cept.

Even if the Pennsylvania Supreme Court's "reasoning" about the signatures made any sense in isolation, the Pennsylvania Supreme Court unreasonably failed to consider the trial judge's "explanation of th[e] form" in his oral instructions. *Abu-Jamal-3*, App. 164. As stated above, part A.2, and as the District Court found, *see Abu-Jamal-3*, App. 163-64, the oral instructions on how to use Page Three *did* make an "explicit correlation" between the signatures and the mitigating circumstances and, thus, cemented the *Mills*-violation that is apparent on the face of the form. The state court unreasonably failed to consider the effect of the oral instructions on the jury's understanding of the form.

(f) The Pennsylvania Supreme Court added nothing to the above-described analysis when it concluded by asserting that it previously had approved a "verdict slip[] similar to" the *Abu-Jamal* slip, in *Commonwealth v. Murphy*, 657 A.2d 927 (Pa. 1995). The entire discussion of the verdict slip in *Murphy* is that "the portion of the verdict slip where the jury is to list mitigating circumstances is set apart from sections A and B of the verdict slip which do require a finding of unanimity." 657 A.2d at 936. There is no description of what the *Murphy* verdict slip actually said.

3. The Pennsylvania Supreme Court's failure to consider the oral instructions on how to use the form, *see* part 2.e, *supra*, is symptomatic of its general violation of the clearly established law that a "single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyde*, 494 U.S. at 378. The Pennsylvania Supreme Court looked at each page of the form *in isolation* from the other parts of the form and from the form's overall structure, and *failed to consider the oral instructions at all*. The state court decision is thus contrary to or, at least, an unreasonable application of, *Mills* and *Boyde*. *See Abu-Jamal-3*, App. 152-54 (Pennsylvania Supreme Court unreasonably considered "only the verdict sheet" and never undertook the analysis required by *Boyde* and *Mills*); *id.*, App. 168 ("Pennsylvania Supreme Court failed even to address the *Boyde* standard or the consequence of the jury instructions in this case");

Abu-Jamal-4, App. 78 (Pennsylvania Supreme Court unreasonably "reached this conclusion [denying relief] without evaluating whether there was a reasonable likelihood that the jury could have misinterpreted the entire scheme employed at the sentencing phase, that is, the structure and substance of the verdict form together with the oral instructions from the judge."); *id.*, App. 80 ("It was unreasonable for the Pennsylvania Supreme Court" to deny relief "based on only a portion of the form, rather than the entire form, and without evaluating . . . the judge's jury instructions and the entire verdict form together.").

4. Even aside from the many flaws in its analysis, described above, the Pennsylvania Supreme Court's decision is "objectively unreasonable," *Williams*, 529 U.S. at 409, simply because it is unreasonable to fail to find a *Mills* violation on this record. The verdict form *plainly requires* that mitigating circumstances be unanimously found; the oral instructions themselves violate *Mills*, and certainly do not cure the form's *Mills* error. It was unreasonable for the Pennsylvania Supreme Court to fail to find a "reasonable likelihood" that the jurors understood the form and instructions in a way that violated *Mills*.

C. The Commonwealth's Arguments are Erroneous

The Commonwealth's arguments for "reasonableness" of the state court decision are erroneous.

1. The Commonwealth says "the state court could not have misapplied 'clearly established' federal law" because, supposedly: in *Mills* "it was undisputed that jurors had been *explicitly* instructed that unanimity was required to find mitigating circumstances"; while in *Abu-Jamal* the unanimity requirement was not "explicit." *Petition* at 7, 9 (emphasis in *Petition*); *see generally id.* at 7-14 (same argument). The Commonwealth errs, for several reasons.

First, the *Mills* instructions were not "explicit" in the way the Commonwealth suggests. There was a "plausible" "construction of the [*Mills*] jury instructions and verdict form," taken as a whole, that did *not* require unanimity. 486 U.S. at 377; *see also id.* at 382 (instructions and form

suffered from "*ambiguity*"). This Court reiterated this in *McKoy v. North Carolina*, 494 U.S. 433, 444 n.8 (1990), when the Court contrasted the "express" unanimity requirement in *McKoy* with the ambiguous situation in *Mills*:

> In *Mills*, the Court divided over the issue whether a reasonable juror could have interpreted the instructions in that case as allowing individual jurors to consider only mitigating circumstances that the jury unanimously found. . . . In [*McKoy*], *by contrast*, the instructions and verdict form *expressly* limited the jury's consideration to mitigating circumstances unanimously found.

494 U.S. at 444 n.8; *see also id.* at 445 (Blackmun, J., concurring) (Mills "instructions were held to be invalid because they were susceptible of two plausible interpretations, *and under one of those interpretations the instructions were unconstitutional*") (emphasis in original).

Second, the *Abu-Jamal* verdict form and instructions were as "explicit" in their unanimity requirement as those in *Mills*. As set forth above, part A, the verdict form's opening statement expressly told the jury that *all of its findings* on the form – including the sentence, aggravating circumstances and *mitigating* circumstances – should be findings of the unanimous jury; the verdict form expressly told the jury to record and consider only mitigating circumstances that "We, the jury, have found unanimously"; and the oral instructions reinforced these *Mills*-violating rules. Moreover, the *Abu-Jamal* verdict form is not even subject to the "plausible" saving construction given the *Mills* form by the Maryland courts. *See* part A.1.f, *supra*.

Third, even if an "explicit"/non-"explicit" distinction had any weight, it is irrelevant to the reasonableness *vel non* of the state court decision because the state court did not rely on that distinction. Because the Commonwealth's argument was not relied upon by the state court, that argument "has no bearing on whether the [state court] decision reflected an objectively unreasonable application" of clearly established law. *Wiggins v. Smith*, 539 U.S. 510, 529-30 (2003).

Finally, the Commonwealth is far off the mark when it claims that "the state court could not have misapplied 'clearly established' federal law," *Petition* at 7, simply because there are factual differences between *Mills* and *Abu-Jamal*.

> AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Carey v. Musladin*, 549 U.S. 70, —, 127 S.Ct. 649, 656 (2006) (Kennedy, J., concurring in judgment). Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003). The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner. *See, e.g., Williams v. Taylor*, 529 U.S. 362 (finding a state-court decision both contrary to and involving an unreasonable application of the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)).

Panetti v. Quarterman, 127 S.Ct. 2842, 2858 (2007) (parallel citations omitted).

Mills and *Boyde* establish a "general standard," *Panetti*, that jury instructions violate the Eighth Amendment when there is a "reasonable likelihood" that the jury interpreted the instructions as requiring a unanimous mitigation finding, *Mills*; *Boyde*, 494 U.S. at 378, 380. The District Court and Third Circuit did not err when they found that the state court failed to reasonably apply the *Mills/Boyde* standard.

2. The Commonwealth says the state court must be "reasonable" because the Third Circuit, in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991), denied a *Mills* claim involving what supposedly were "instructions virtually identical to those here." *Petition* at 17; *see also id.* at 1, 5, 18-22 (same argument about *Zettlemoyer*).[6] This argument is frivolous.

The Commonwealth's claim that the *Zettlemoyer* "instructions [were] virtually identical to those here" is utterly wrong. In making this claim, the Commonwealth quotes *one sentence* of the *oral* instructions given in *Zettlemoyer*. *See Petition* at 17 n.6. While *this single sentence* is "linguis-

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6. The *Zettlemoyer* panel split 2-1 on the merits of the *Mills* claim. *See* 923 F.2d at 306-08 (majority opinion that *Mills* was not violated); *id.* at 316-17 n.3 (opinion of Sloviter, J.) ("I believe that the instruction and verdict slip violated the holding in *Mills* . . . . [However], I believe it is likely that the Supreme Court would view *Mills* as announcing a new rule and thus this claim . . . is subject to the almost insurmountable barrier on retroactive application announced in *Teague*.").

tically similar" to *one part* of the *oral* instructions given in *Abu-Jamal*, there are "important distinctions" between the *Zettlemoyer* and *Abu-Jamal* oral instructions as a whole. *Abu-Jamal-3*, App. 145; *see id.*, App. 158-65 (describing "numerous aspects" of the *Abu-Jamal* oral instructions that materially differ from the *Zettlemoyer* oral instructions).

More significantly, there are *vast differences* between the *verdict forms* in *Zettlemoyer* and *Abu-Jamal*. *See Abu-Jamal-3*, App. 142, 166 n.92 (describing some ways in which *Abu-Jamal* verdict "sheet differed significantly from that used in *Zettlemoyer*"). The Commonwealth does not even claim that the *Zettlemoyer* verdict form was "virtually identical" to the *Abu-Jamal* form – the Commonwealth never mentions the *Zettlemoyer* form. Even if it is falsely assumed that the *Zettlemoyer* oral instructions were *identical* to those given here, the differences in the *verdict forms* make this a very different case from *Zettlemoyer*.

The *Zettlemoyer* verdict form stated:

> 1. We the jury unanimously sentence the defendant to: [X] death ___ life imprisonment.
> 2. (To be used in the sentence if death)
> We the jury have found unanimously:
> ___ at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance is _____.
> [X] the aggravating circumstance outweighs [the] mitigating circumstances. The aggravating circumstance is [the murdering of a prosecution witness to prevent testimony in a felony case.]

Zettlemoyer, 923 F.2d at 308 (footnote omitted); *see also Abu-Jamal-3*, App. 141-42 (quoting *Zettlemoyer* form).

In finding the *Zettlemoyer* form unobjectionable, the Third Circuit stressed two things about that form, both of which materially distinguish the *Zettlemoyer* form from the *Abu-Jamal* form.

First, the *Zettlemoyer* form said "We the jury have found unanimously . . . The aggravating circumstance is "_____," but there was *no such language* for *mitigating* circumstances. 923 F.2d at 308. "This language requires that the jury's conclusion on the particular aggravating circumstance must be unanimous. The *absence of a similar instruction for mitigating circumstances indicates that una-*

nimity is not required." *Id.* In sharp contrast, the analogous part of the *Abu-Jamal* form contains identical language for aggravating *and* mitigating circumstances: "We, the jury, have found *unanimously* . . . The aggravating circumstance(s) is/are _____. The *mitigating circumstance(s) is/are* _____." *See also* part A.1, *supra* (quoting *Abu-Jamal* form). Thus, on the *Abu-Jamal* form the *presence* of "a similar instruction for mitigating circumstances indicates that unanimity" *is required.*

Second, on the *Zettlemoyer* form, while "the jury was obliged to specify the aggravating circumstance it found, it had no such duty with respect to mitigating circumstances, thus suggesting that consideration of mitigating circumstances was broad and unrestricted." 923 F.2d at 308. Again, the *Abu-Jamal* form is very different—the *Abu-Jamal* form requires the jury to specify *both* the aggravating circumstances *and* the mitigating circumstances it found, with no distinction made between the two. Thus, the *Abu-Jamal* form requires that both aggravating and mitigating circumstances be unanimously found.

In short, the *Abu-Jamal* form suffers from *exactly* the *Mills*-violating features that the Third Circuit found *absent* from the *Zettlemoyer* form. Moreover, the *Abu-Jamal* form requires a unanimous mitigation finding for additional reasons that also were absent from the *Zettlemoyer* form. *See* part A, *supra*. There is no basis for the Commonwealth's claim that the *Zettlemoyer* and *Abu-Jamal* instructions are materially identical.

3. The Commonwealth says the state court "could not have been unreasonable" because some Courts of Appeal have denied *Mills* claims arising in other states "where there [wa]s no explicit unanimity requirement" for mitigating circumstances. *Petition* at 14-15; *see id.* at 13-17, 21-22 (same argument). The Commonwealth's argument fails for reasons similar to those discussed above – *e.g.*, *Mills* and *Boyde* do not draw the line between "explicit" and non-"explicit," they distinguish between instructions that are "reasonably likely" to make the jury believe it must unanimously find mitigation and those are not "reasonably likely" to do so; the *Abu-Jamal* verdict form actually *is*

"explicit" in requiring unanimity for mitigating circumstances; the instructions and verdict forms in the cases cited by the Commonwealth do not have the features of the *Abu-Jamal* form and instructions that make the *Abu-Jamal* form and instructions violative of *Mills*.

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE COMMONWEALTH'S QUARREL IS WITH THE LOWER COURTS' APPLICATION OF PROPERLY STATED RULES OF LAW TO THE FACTS OF THIS CASE

A petition for a writ of certiorari "is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Supreme Court Rule 10. Here, the District Court and the Third Circuit applied to the facts of this case "properly stated rule[s] of law" for both (1) the constitutional merits of the *Mills* claim and (2) the deference due the state court decision under AEDPA. Thus, certiorari should be denied.

A. The District Court and the Third Circuit Expressly Applied the Correct Rule of Federal Constitutional Law

It is undisputed that the applicable rule of federal constitutional law is that of *Mills v. Maryland*, 486 U.S. 367 (1988), as clarified by *Boyde v. California*, 494 U.S. 370 (1990). *See Petition* at 11, 14. Under *Boyde*, the "proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." 494 U.S. at 380.

Both the District Court and the unanimous Third Circuit *expressly recognized* that *Boyde*'s "reasonable likelihood" standard applies here and *expressly applied* that standard to the facts of Mr. Abu-Jamal's case. *See* Counterstatement of the Case §§ B-C (quoting District Court and Third Circuit decisions); *Abu-Jamal-4*, App. 6 ("whether the jury charge and sentencing verdict sheet violated Abu-Jamal's constitutional rights under *Mills v. Maryland*, 486 U.S. 367 (1988), and *Boyde v. California*, 494 U.S. 370 (1990)"), App. 66 ("The District Court granted relief on Abu-Jamal's claim that the jury instructions and verdict form employed in the sentencing phase of Abu-Jamal's trial were constitutionally defective under *Mills v. Maryland*, 486 U.S. 367 (1988), and *Boyde v. California*, 494 U.S. 370 (1990) The District Court found a 'reasonable likelihood that the jury has applied the .

. . instruction [and form] in a way that prevents the consideration of constitutionally relevant evidence' regarding the existence of mitigating circumstances . . ." (quoting *Boyde*)), App. 73 ("We must determine whether the Pennsylvania Supreme Court decision was unreasonable in light of *Mills* and *Boyde*."), App. 74-75 ("In *Mills*, the Court posed '[t]he critical question . . . whether petitioner's interpretation of the sentencing process is one a reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case.' *Id.* at 375-76. In *Boyde v. California* 494 U.S. 370 (1990), the Supreme Court clarified the legal standard as 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.' *Id.* at 380."), App. 78 (proper inquiry is "whether there was a reasonable likelihood that the jury could have misinterpreted the entire scheme employed at the sentencing phase, that is, the structure and substance of the verdict form together with the oral instructions from the judge"), App. 79 ("The District Court found the Pennsylvania Supreme Court's decision was objectively unreasonable under *Mills* and *Boyde*."), App. 80 ("The [District C]ourt concluded the verdict form and jury instructions 'created a reasonable likelihood that the jury believed that it was precluded from considering a mitigating circumstance that had not been found unanimously to exist.'"), App. 80 ("We agree the Pennsylvania Supreme Court's [decision was an] unreasonable application of *Mills* and *Boyde*."), App. 81 (court must evaluate "whether this language would create a reasonable likelihood the jury had applied the form in violation of *Mills*"), App. 83 ("We conclude the Pennsylvania Supreme Court's decision was objectively unreasonable under the dictates of *Mills* and *Boyde*. The jury instructions and the verdict form created a reasonable likelihood that the jury believed it was precluded from finding a mitigating circumstance that had not been unanimously agreed upon."); *Abu-Jamal-3*, App. 127-28 (asking "whether there is a reasonable likelihood that the jury [as opposed to a reasonable individual juror] has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence" (quoting *Boyde*, bracketed material in original), App. 128 n.80 ("the Third Circuit repeatedly

has noted the applicability of the *Boyde* standard in assessing *Mills* claims"), App. 128 n.80 ("There is no dispute, . . . indeed, [Third Circuit decisions] *Frey* and *Banks* make this point explicitly—that the standard to be applied to *Mills* claims is that articulated in *Boyde*. Accordingly, I am concerned in evaluating petitioner's *Mills* claim with whether there is 'a *reasonable likelihood* that the jury *has* applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.' *Boyde*, 494 U.S. at 380 (emphasis added)."), App. 153 (under *Mills* and *Boyde*, question is "whether the charge created a reasonable likelihood that the jury applied the instruction in a way that prevented the consideration of constitutionally relevant evidence"), App. 158 ("There are numerous aspects of this [*Abu-Jamal*] charge that created a reasonable likelihood that the jury believed that it was obligated to consider only mitigating circumstances that were found to exist by a unanimous panel."), App. 162-63 (quoting *Boyde* as requiring determination as to whether there is "a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence"), App. 163 ("This further indicates that there is a reasonable likelihood that the [*Abu-Jamal*] jury believed that this specific articulation of the unanimity requirement pertained to its task of finding mitigating circumstances."), App. 164 ("this aspect of the instructions indicates that there is a reasonable likelihood that the jury believed that it was precluded from considering mitigating circumstances that were not unanimously found to exist"), App. 168 ("To conclude, the jury charge and verdict form in this case created a reasonable likelihood that the jury believed that it was precluded from considering a mitigating circumstance that had not been found unanimously to exist."), App. 169 ("the jury charge and verdict form produced a 'reasonable likelihood that the jury has applied the . . . instruction [and form] in a way that prevents the consideration of constitutionally relevant evidence.' *Boyde*, 494 U.S. at 380.").

The Commonwealth, however, claims that the Third Circuit did not apply *Boyde*. Instead, according to the Commonwealth:

Under the Third Circuit's view of *Mills*, relief is required if one may posit a "risk of

> confusion," 520 F.3d at 303 (App. 82), such that jurors hearing that unanimity applies to some aspects of the capital sentencing decision might, without being told, assume unanimity is also necessary to finding mitigating circumstances.

Petition at 8; *see also Petition* at 6, 9, 11, 12, 14, 21 (asserting that Third Circuit applied a "risk of confusion" standard).

The Commonwealth's assertion is frivolous, given how clearly the Third Circuit identified and applied *Boyde* as the controlling standard. The Third Circuit never held or even suggested that the constitutional test is "risk of confusion." Instead, the Third Circuit used the "risk of confusion" language to describe the likely effect of *one part* of the instructions – the burden of proof instructions. *See* App. 82 ("The risk of confusion is higher where the court distinguishes between aggravating and mitigating circumstances on one ground [burden of proof], but not on any other."). As to the verdict sheet and instructions *as a whole*, the Third Circuit repeatedly made clear that *Boyde*'s "reasonable likelihood" standard applies, as set forth above. Indeed, the Third Circuit criticized the Pennsylvania Supreme Court for *failing to apply* the *Boyde* standard, *see* App. 81 ("The Pennsylvania Supreme Court did not evaluate whether this language would create a reasonable likelihood the jury had applied the form in violation of *Mills*."), as did the District Court, *see* App. 154 ("the Pennsylvania Supreme Court never mentioned, much less did it apply, the *Boyde* standard for evaluating claims pursuant to *Mills*").

That the Third Circuit identified and applied the *Boyde* "reasonable likelihood" standard, rather than a "risk of confusion" standard, is also highlighted by the fact that the Third Circuit praised the District Court's opinion for having "thoroughly explored" the *Mills* claim. The Commonwealth does not even contend that the *District Court* used a "risk of confusion" standard or any other improper standard – it is undisputed that the District Court applied *Boyde*'s "reasonable likelihood" standard. Thus, the Third Circuit's glowing review of the District Court's opinion confirms that the Third Circuit, like the District Court, applied *Boyde*.

B. The District Court and the Third Circuit Expressly Applied the Correct Law of Deference to the State Court under 28 U.S.C. § 2254(d)

Because the Pennsylvania Supreme Court decided the *Mills* claim on the merits, AEDPA's 28 U.S.C. § 2254(d)(1) applies, *i.e.*, habeas relief is appropriate if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

Both the District Court and the unanimous Third Circuit *expressly recognized* that § 2254(d)'s deferential standard applies here, and *expressly applied* that deferential standard to the facts of Mr. Abu-Jamal's case. *See* Counterstatement of the Case §§ B-C (quoting District Court and Third Circuit decisions); *Abu-Jamal-4*, App. 17 (§ 2254(d)(1) applies here; "the question . . . is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold" (quoting *Landrigan*, 127 S.Ct. at 1939, citing *Williams*, 529 U.S. at 410)), App. 51 (recognizing "AEDPA's deferential standard of review"), App. 53 n.21 (recognizing "the deferential standards provided by AEDPA § 2254(d)"), App. 55 (§ 2254(d)(1) applies here; it "creates an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings" and gives "binding [] directions to accord deference" (quoting and citing *Uttecht*, 127 S.Ct. at 2224; *Landrigan*, 127 S.Ct. at 1939; *Williams*, 529 U.S. at 413)), App. 72 ("Our review is limited to whether the Pennsylvania Supreme Court unreasonably applied *Mills*." (citing § 2254(d)(1); *Williams*, 529 U.S. at 405)), App. 73 ("We must determine whether the Pennsylvania Supreme Court decision was unreasonable"); *Abu-Jamal-3*, 2001 WL 1609690 at *10-*11 (recognizing that the United States Supreme Court has "cautioned federal habeas courts against insufficiently deferential review of state court decisions"; emphasizing that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law" (quoting *Williams*, 529 U.S. at 410); stating "It is important to recognize that AEDPA requires of federal habeas courts greater deference to state court applications of law to fact than did prior law." (citing *Williams*); AEDPA imposed "restriction[s] of independent federal re-

view"), *id.* at *107 ("Again, I stress that . . . a federal habeas court should ask whether the state court's application of clearly established federal law was objectively unreasonable, which is different from an incorrect application of federal law" (citing *Williams*); "AEDPA standard requires federal habeas courts to give greater deference to state court applications of law to fact than did prior law"), App. 132 ("The issue . . . is whether there was an unreasonable application of *Mills* in petitioner's case."), App. 132-33 n.82 ("[I]t is important to reiterate here that the standards under which [Mr. Abu-Jamal's] *Mills* claim must be evaluated are those set forth in the AEDPA. . . . Therefore, habeas relief will not be warranted pursuant to *Mills* if it is merely the case that, had I evaluated [Mr. Abu-Jamal's] *Mills* claim *ab initio*, I would have found it to be meritorious. . . . [A] significant degree of deference is due the state supreme court's application of federal law."), App. 135 (*Mills* claim "is subject to the strictures of § 2254(d)"), App. 169 (state court "decision was an objectively unreasonable application of federal law").

Given how clearly the District Court and Third Circuit identified and applied the correct rule of deference under § 2254(d), the Commonwealth's request for this Court's review should be denied.

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE ISSUES ON WHICH THE COMMONWEALTH SEEKS REVIEW ARE NOT OF NATIONAL IMPORTANCE AND ARE OF VERY LIMITED SIGNIFICANCE EVEN IN PENNSYLVANIA

The Commonwealth asks this Court to review the constitutionality under *Mills* and *Boyde* of the jury instructions given at Mr. Abu-Jamal's 1982 sentencing. As set forth above, § I.C.3, the *Abu-Jamal* instructions differ significantly from instructions given in other jurisdictions. Thus, the Commonwealth does not seek review of the type of "question[s] of national importance" that this Court grants certiorari to address. *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003). Given the local nature of the issues, certiorari should be denied.

Moreover, the issues presented by the Commonwealth are of very limited significance *even in Pennsylvania* – the issues can arise in only a small fraction of Pennsylvania capital cases, due to a combination of *Mills*' non-retroactivity, post-*Mills* changes made to Pennsylvania verdict forms and

instructions, and other factors.

This Court decided *Mills* on June 6, 1988. Under *Teague v. Lane*, 489 U.S. 288 (1989), the rule of *Mills* is available only to habeas petitioners whose convictions became final after that date. *Beard v. Banks*, 542 U.S. 406 (2004).

As set forth in § I, *supra*, Pennsylvania's courts quickly responded to *Mills* by changing verdict forms and instructions to ensure *Mills*-compliance; just a few months after *Mills*, the Pennsylvania Supreme Court began requiring standardized, *Mills*-compliant forms and instructions.

Because of this combination of the non-retroactivity of *Mills* and the post-*Mills* adoption of *Mills*-compliant verdict forms and instructions, only a narrow group of Pennsylvania capital cases may have *Mills* claims that would present the issues on which the Commonwealth seeks review. First, the case cannot be "too new"—it had to be tried *before Mills*, or at least before the February 1, 1989 official change in the verdict form. This eliminates every case *tried in the last twenty years*. Second, the case cannot be "too old"—it had to be final *after Mills*. This eliminates another significant body of cases. In addition, the *Mills* claim must survive all other habeas-related barriers, such as the exhaustion requirement and procedural default rules. Only a narrow set of cases can survive this "filtering" and present the issues for which the Commonwealth seeks review.

This limited relevance of *Mills* in Pennsylvania is reflected in the decisions of the Third Circuit. Apart from Mr. Abu-Jamal's case, the Third Circuit has addressed *Mills* claims in eight other Pennsylvania capital cases—*Zettlemoyer v. Fulcomer*, 923 F.2d 284, 306-08 (3d Cir. 1991); *Frey v. Fulcomer*, 132 F.3d 916, 920-25 (3d Cir. 1997); *Szuchon v. Lehman*, 273 F.3d 299, 320-24 (3d Cir. 2001); *Hackett v. Price*, 381 F.3d 281 (3d Cir. 2004); *Albrecht v. Horn*, 485 F.3d 103, 116-20 (3d Cir. 2007); *Fahy v. Horn*, 516 F.3d 169, 175-76 (3d Cir. 2008); *Banks v. Horn*, No. 99-9005 (3d Cir. Aug. 25, 2004); and *Kindler v. Horn*, 542 F.3d 70, 80-83 (3d Cir. 2008).

In *six* of these eight cases, the Third Circuit *denied relief* on the *Mills* claim. *See Zettlemoyer*; *Szuchon*; *Hackett*; *Albrecht*; *Fahy*; *Banks*. In three of these denials the Third Circuit de-

nied the *Mills* claim because it was barred by *Teague*. *See Banks*; *Albrecht*; *Fahy*. In one, the Third Circuit denied the *Mills* claim because it was procedurally defaulted. *See Szuchon*. In two, the Third Circuit denied the *Mills* claim on the merits—under pre-AEDPA *de novo* review in *Zettlemoyer* and under AEDPA's § 2254(d) in *Hackett*.

In just *two* of these eight cases, *Frey* and *Kindler*, did the Third Circuit grant relief under *Mills*. In both cases, habeas review was *de novo*, not under AEDPA's § 2254(d). In *Frey*, the claim *would have been denied* under *Teague* had the Commonwealth not waived its *Teague* defense. 132 F.3d at 920 n.4.

In short, the Third Circuit's *Mills* decisions highlight the limited availability of *Mills* in Pennsylvania due to the above-described combination of non-retroactivity, post-*Mills* changes to Pennsylvania's verdict forms and instructions, and other procedural issues; the rulings also show that even when the rare *Mills* claim survives that gauntlet of obstacles, the Third Circuit takes a nuanced approach which has led it to grant relief in some cases and deny it in others.

The Commonwealth cites six district court rulings on *Mills* claims—*Lambert v. Beard*, 2007 U.S. Dist. LEXIS 54047 (E.D. Pa. 2007); *Morris v. Beard*, 2007 U.S. Dist. LEXIS 44707 (E.D. Pa. 2007); *Williams v. Beard*, 2007 U.S. Dist. LEXIS 41310 (E.D. Pa. 2007); *Cross v. Price*, 2005 U.S. Dist. LEXIS 18510, 15-16 (W.D. Pa. 2005); *Thomas v. Beard*, 388 F.Supp.2d 489 (E.D. Pa. 2005); *Rollins v. Horn*, 2005 U.S. Dist. LEXIS 15493 (E.D. Pa. 2005). *See Petition* at 7. According to the Commonwealth, these cases show that the "*Mills* deference issues live on" and "show[s] no sign of abating." *Petition* at 7, 22; *see also id.* at 1, 6 (same argument).

Actually, the district court rulings, like the Third Circuit's decisions, highlight the limited importance of *Mills* in Pennsylvania. In *four* of these six district court cases, the district courts *denied relief* on the *Mills* claim. *See Lambert* at 118-38; *Williams* at 171-73; *Cross* at 15-18; *Thomas* at 530. In *Cross* and *Thomas*, the claim was *Teague*-barred. In *Lambert* and *Williams*, the district court applied the Third Circuit's decision in *Hackett*, *supra*, and denied relief under the deferential

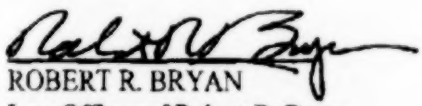
standards of § 2254(d). In the two cases where *Mills* relief was granted, *Morris* at 94-113, and *Rollins* at 37-44, *Morris* was under pre-AEDPA *de novo* review; thus, *Rollins* is the sole case cited by the Commonwealth in which *Mills* relief was granted under AEDPA's § 2254(d).

In short, Mr. Abu-Jamal's meritorious *Mills* claim is a rarity even in Pennsylvania. This Court should not waste its rarely granted certiorari jurisdiction on this case.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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February 13, 2009

AFFIDAVIT OF MAILING PURSUANT TO RULE 29.2

I, Robert R. Bryan, declare under penalty of perjury that I am a member in good standing of the Bar of the United States Supreme Court. My business address is Law Offices of Robert R. Bryan, 2088 Union Street, Suite 4, San Francisco, California 94123. On this date, I deposited in a United States mail box, first class postage pre-paid and properly addressed to the Clerk of this Court, a Brief In Opposition in the above-entitled cause. To the best of my knowledge, the mailing took place on February 13, 2009, within the permitted time.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 13th day of February, 2009, at San Francisco, California.

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MAR 18 2009
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SUPREME COURT, U.S.

No. 08-652

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, et al.
Petitioners

v.

MUMIA ABU-JAMAL,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Reasons for granting the writ

Judge v. Beard confirms the importance of the issues in this case.

This supplemental brief is filed pursuant to Rule 15.8, "calling attention to new cases." *Judge v. Beard*, Civil Action No. 02-CV-6798, is an opinion and order in the Eastern District of Pennsylvania granting federal habeas relief under *Mills* on the habeas petitioner's motion for summary judgment. While the decision is dated March 13, 2009, it was not entered until March 17, 2009, and was received by petitioner today, March 18, 2009.

The *Judge* court found the *Mills* claim materially indistinguishable from Third Circuit cases including *Abu-Jamal, Kindler v. Horn*, 542 F.3d 70, 83 (3d Cir. 2008) *cert. petition pending sub. nom. Beard v. Kindler*, and *Frey v. Fulcomer*. All those decisions follow the circuit court's decision in *Banks v. Horn* (which *Beard v. Banks* overruled without reaching the instant deference questions).

Judge confirms, contrary to respondent's argument (brief in opposition, 34-35), that the circuit court's view of *Mills* is an ongoing problem in federal habeas review of Pennsylvania capital cases.

Of greater interest is the *Judge* court's understanding of the circuit court's precedent. In

granting summary judgment for the habeas petitioner it relied on the above cases and concluded that the state court decision could not stand because "the importance of a unanimous finding was discussed within very close proximity to the mitigating circumstances clause," and because "there was no discussion or directive that the jury need *not* be unanimous[.]" *Judge*, 34-35 (original emphasis). *Compare* petitioner's reply brief at 5, 10-11 (explaining that "proximity" and "non-unanimity instruction" rationales have no basis in *Mills*, as many federal appellate courts have held).[1]

---

[1] As in many cases in this circuit, the court in *Judge* also deemed a state procedural default rule "inadequate" because the state court had discretion not to apply it in every case. That same issue is presented in the Commonwealth's currently pending petition for certiorari in *Beard v. Kindler*, No. 08-992.

Conclusion

For the reasons stet forth above, the Commonwealth respectfully requests this Court to grant its petition for writ of certiorari.

Respectfully submitted:

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Capital case: Questions presented

1. Can a state court's failure to anticipate a rule not clearly stated by this Court but derived from *Mills* by a federal circuit court be an unreasonable application of "clearly established" federal law?

2. Can a state court ruling amount to an "unreasonable" application of federal law where the state court decision conforms to consistent decisions of federal appellate courts over the course of a decade?

[These questions were presented but left undecided in *Beard v. Banks*, 542 U.S. 406 (2004)]

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Reasons for granting the writ

1. The grant in *Smith v. Spisak* warrants certiorari in this case.

The deference issue here is substantially identical to that in *Smith v. Spisak*, 08-724 (certiorari granted February 23, 2009). *Compare* Ohio petition for certiorari at 17 (arguing that 6th Circuit found *Mills* error due to "implie[d]" mitigation unanimity requirement); 20 (circuit court applied rule not found in *Mills*); 21 and reply brief at 4-5 (arguing that circuit court overturned reasonable state decision, citing *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir.), *cert. denied*, 502 U.S. 902 (1991)) *with* Commonwealth's petition at 13-14 & n.4, 22 & n.11.

The grant in *Spisak* establishes the importance of the same AEDPA deference issue here. Indeed, this same issue was left unresolved in *Beard v. Banks*, 542 U.S. 406 (2004). The Third Circuit cited and relied on its own merits ruling in *Banks v. Horn*, 271 F.3d 527, 548 (3d Cir. 2001) (which *Banks v. Beard* reversed on other grounds), in deciding this case.

Because proper understanding of AEDPA deference is a national problem, certiorari should be granted.

2. Respondent deletes parts of the verdict form to feign a unanimity requirement.

The jurors in *Mills v. Maryland*, 486 U.S. 367 (1988), were explicitly instructed that they must be unanimous to find mitigation.[1] *No court has ever found* that the jurors *here* were so instructed. The circuit court instead relied on a "risk of confusion" from an "impression" derived from the presence of the word "unanimity" "in close relation to ... discussion of mitigating circumstances." *Abu-Jamal v. Horn*, 520 F.3d at 303 (App. 81).

Yet, surprisingly, respondent now claims that the verdict form "plainly require[d]" jurors "to find each mitigating circumstance unanimously," and purports to show that there was "an express unanimity requirement" on the form (respondent's brief, 9, italics omitted).

Obviously the circuit court would have relied on this supposed "express unanimity requirement" if it existed, but it does not. Respondent invents it by omitting language from the form to imply that an express unanimity instruction was given where none was.

---

[1] *Mills*, 486 U.S. at 378 ("it was clear that the jury could not mark "yes" in any box without unanimity"); 401 (verdict form stated "we unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven").

By deleting several sentences and italicizing certain words, respondent seeks to make it appear as if the verdict form said "We, the jury, have found unanimously [that] the mitigating circumstances are..." (respondent's brief, 19 & 27: "We, the jury, have found *unanimously* ... The aggravating circumstance(s) is/are _A_. The *mitigating circumstance(s) is/are* _A_.") (his italics).

But of course the form did not say this.

The verdict form (*see* App. 186-187) required jurors returning a death verdict to unanimously find either that there were aggravating circumstances and no mitigating circumstances, or that aggravating circumstances outweighed any mitigating circumstances. On the form, the word "unanimously" modified these two options (aggravation alone or aggravation of greater weight) -- neither of which addressed how to find mitigating circumstances. Indeed, the latter option required jurors to weigh aggravation against "any" mitigation. The language that respondent replaces with an ellipsis plainly conveyed this, and plainly did not purport to instruct jurors on how to find mitigation (the omitted language is in bold):

> **(2) (To be used only if the aforesaid sentence is death)**
>
> We, the jury, have found unanimously

> **___ at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance(s) is/are _____.**
>
> _X_ one or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstance(s) is/are
> __A_____.
> The mitigating circumstance(s) is/are
> __A_____.

(*compare* respondent's brief, 9).

Respondent's redaction of the form was not what the jurors saw. It is therefore clear *why* no court in this case ever found that there was an express mitigation unanimity requirement – there was none.

When respondent's misrepresentation of the form is corrected, it becomes apparent that his position is really the same as that of the circuit court, which has consistently concluded that "unanimously" modifies "mitigation" *by its mere proximity*. *Abu-Jamal v. Horn*, 520 F.3d at 303 (App. 81) (explaining that word "unanimity" appeared "in close relation" to instructions on mitigation); *Banks v. Horn*, 271 F.3d 527, 548, 550 (3d Cir. 2001), *reversed on other grounds sub. nom. Beard v. Banks*, 542 U.S. 406 (2004) (stating that *Mills* error can arise from

"proximity" of words and concluding that "lead in language" of verdict form, "We the jury have found unanimously," was "confusing" and "suggestive" of "the need for unanimity to find mitigation" such that "by implication" everything that followed had to be found unanimously); *Frey v. Fulcomer*, 132 F.3d 916, 923 (3d Cir.1997), *cert. denied*, 524 U.S. 911 (1998) (followed by circuit court in *Banks*; finding *Mills* error because the word "unanimous" was seven words away from word "mitigating" and so created a "sound bite" such that it was "possible" that a juror would "believe" that mitigation had to be found unanimously).

All of respondent's and the circuit court's arguments ultimately proceed from the premise that wordplay can substitute for an explicit instruction under *Mills*. This broad premise supports a great variety of arguments. *E.g.*, respondent's brief at 9, 15-16 (contending that jurors addressed as "jury" or "you" would understand these words to mean "unanimous jury"). But it is not the premise of *Mills*. There was no mitigation unanimity instruction here, nor would any reasonable juror have understood the (complete) text of the form in the manner suggested by respondent's deletions. *Boyde v. California*, 494 U.S. 370, 381 (1990) (jurors do not "pars[e] instructions for subtle shades of meaning").

"The *Mills* rule applies fairly narrowly." *Beard v. Banks*, 542 U.S. at 420. It holds that the state may not instruct jurors to be unanimous to find mitigating

factors. But the jurors here were never told they must be unanimous to find mitigating factors. The state judgment was overturned, not under the rule in *Mills*, but under the circuit court's "risk of confusion" rule. That state judgment was entitled to deference, and so should have been upheld unless it was contrary to a prior decision of *this* Court.

3. Deference in name only is not deference.

Respondent argues that the Commonwealth merely disputes the application of the AEDPA deference standard under § 2254 that the circuit court "expressly recognized" (respondent's brief, 3, 5, 29-32, italics omitted).

But quoting the proper standard hardly amounts to following it. Similar "recognition" of AEDPA deference in other cases has warranted reversal, and sometimes summary reversal. *E.g.*, *Brown v. Payton*, 544 U.S. 133, 140 (2005) (circuit court "purported" to decide "under the deferential standard AEDPA mandates," but proceeded to overturn a reasonable state decision); *Bell v. Cone*, 543 U.S. 447, 451-452 (2005) (*per curiam*) (6th Circuit

cited "contrary to" standard but misapplied it).[2]

Respondent stresses that the circuit court was unanimous (respondent's brief, ii, 7, 8, 17), but this kind of unanimity is nothing to brag about. The circuit court has previously denied deference in this same manner. *E.g. Banks v.Horn*, 271 F.3d at 541-542 & n.15 (citing AEDPA but stating that circuit court could decide based on its "independent judgment"); *compare Woodford v. Viscotti*, 537 U.S. 19, 24, 27 (2002) (*per curiam*) (federal court may *not* rely on independent judgment under AEDPA); *Frey v. Fulcomer*, 132 F.3d at 923 (followed by circuit court

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[2] *Yarborough v. Alvarado*, 541 U.S. 652, 660 (2004) (circuit court "considered whether Alvarado could obtain relief in light of the deference a federal court must give to a state-court determination on habeas review" but misapplied that standard); *Yarborough v. Gentry*, 540 U.S. 1, 11 (2003) (*per curiam*) (circuit court cited correct "objectively unreasonable" standard but in applying it gave "too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials"); *Price v. Vincent*, 538 U.S. 634, 639 (2003) (unanimous court) ("Although the [6th Circuit] Court of Appeals recited [the AEDPA] standard ... it proceeded to evaluate respondent's claim de novo rather than through the lens of § 2254(d)") (citation omitted); Lockyer v. Andrade, 538 U.S. 63, 69 (2003) (circuit court "noted that it was reviewing Andrade's petition under the Antiterrorism and Effective Death Penalty Act" but in fact followed "its own precedent"); *Woodford v. Visciotti*, 537 U.S. 19, 21-25 (2002) (*per curiam*) (circuit court cited the "unreasonable application" standard but in fact "substituted its own judgment for that of the state court").

in *Banks*; finding *Mills* error because in instructions the word "unanimous" was seven words away from word "mitigating"); *see also Albrecht v. Horn*, 485 F.3d 103 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 890 (2008) (after holding *Mills* claim was barred, circuit court nevertheless wrote 2700 words to vindicate its *Banks* decision on the merits under AEDPA); *Abu-Jamal v. Horn*, 520 F.3d at 303-304 (App. 82) (citing *Albrecht*, *Banks*, and *Frey*).

As *Smith v. Spisak* confirms, the same denial of deference arises in other federal appellate courts. Their ongoing failure to grasp the proper standard of review is a national problem, not a local one. This fact warranted certiorari in *Banks* and in *Spisak*, and review is warranted here for the same reason.

The deference requirement would be rendered meaningless if courts could meet it by simply reciting boilerplate, giving lip service to the standard while ignoring its substance. This Court can provide needed guidance to federal courts by correcting this erroneous approach to the deference standard.

4. The state ruling was consistent with mainstream federal appellate decisions.

As shown below, it is clear even from respondent's own arguments that the circuit court followed its "risk of confusion" rule, not the rule in *Mills*. It is equally clear, from how *Mills* has been applied in federal courts, that the state court's

decision was reasonable. *See Carey v. Musladin*, 549 U.S. 70, 76 (2006) (finding denial of deference where "lower courts have diverged widely in their treatment of [similar] claims").

In *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir.), *cert. denied*, 502 U.S. 902 (1991), the circuit court applied *Mills* to *uphold* a virtually identical Pennsylvania case. The state court expressly relied on *Zettlemoyer* in denying respondent's *Mills* claim. *Commonwealth v. Abu-Jamal*, 30 Phila. 1, 110 (1995) (App. 176).

But when this case reached the circuit court, it turned out differently from *Zettlemoyer* -- not because Pennsylvania changed the way it administered the death penalty, but because the Third Circuit changed its mind (*see* petition for certiorari, 17-21).

The change of mind sets off alarm bells under § 2254. How could the circuit court deem the state decision unreasonable when the state court applied the circuit court's own reasoning?[3]

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[3] According to respondent there are "vast differences" between the instructions and verdict form in *Zettlemoyer* and those in later Third Circuit decisions that explain the different outcomes (respondent's brief, 25-27, italics omitted). This is nonsense. *In this very case* the Third Circuit itself forthrightly acknowledged the "tension" between *Zettlemoyer* and its later decisions, but declined to resolve this tension or

(continued...)

What makes the circuit court's decision here remarkable is not merely this self- contradiction, but the fact that *Zettlemoyer* was in the mainstream. Federal appellate courts have rejected the arguments relied on by respondent and by the circuit court after its change of mind.

For example, *Abdur'rahman v. Bell*, 226 F.3d 696, 712 (6th Cir. 2000), *cert. denied*, 534 U.S. 970 (2001), rejected a claim that *Mills* required relief because the proximity of the terms "unanimous" and "mitigating circumstances" implied that mitigating circumstances must be found unanimously. *Compare* respondent's brief, 15 (arguing that "proximity"of words created error); *Abu-Jamal v. Horn*, 520 F.3d at

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[3](...continued)
discuss its significance under the AEDPA standard. *Abu-Jamal v. Horn*, 520 F.3d at 304, App. 83. Previously, consistent with its "risk of confusion" rule, the circuit court had distinguished *Zettlemoyer* on the ground that, there, the word "unanimous" was 17 words away from "the mitigating circumstances clause," while in *Frey* the word "unanimous" was 7 words away. *Frey v. Fulcomer, supra*, 132 F.3d at 923. *Compare Scott v. Mitchell*, 209 F.3d 854, 875 (6th Cir.), *cert. denied*, 531 U.S. 1021 (2000) (rejecting *Mills* claim even though terms were only 6 words apart); *Noland v. French*, 134 F.3d 208, 213 (4th Cir.) *cert. denied* 525 U.S. 851 (1998) (4 words apart);*Duvall v. Reynolds*, 139 F.3d 768, 792 (10th Cir. 1998) (8 words); *Griffin v. Delo*, 33 F.3d 895, 905 (8th Cir. 1994) (6 words); *Gacy v. Welborn*, 994 F.2d 305, 307 (7th Cir. 1993) (5 words); *Maynard v. Dixon*, 943 F.2d 407, 419 (4th Cir. 1991) (3 words).

303, App. 80-81 (stressing mention of unanimity in "close relation" to discussion of mitigation).

Scott v. Mitchell, 209 F.3d 854, 874 (6th Cir.), *cert. denied*, 531 U.S. 1021 (2000), held that there was no *Mills* issue where jurors were told "all 12 of you must sign [the verdict form] ... [i]t must be unanimous." *Compare* respondent's brief, 9-10 (claiming that requiring all 12 jurors to sign creates *Mills* error); *Abu-Jamal v. Horn*, 520 F.3d at 303, App. 81 (finding *Mills* error because judge said "your verdict must be unanimous ... It must be the verdict of each and every one of you"); *Smith v. Spisak*, certiorari petition at 7 (6th Circuit found *Mills* error because all twelve jurors had to sign the verdict form).

LaFevers v. Gibson, 182 F.3d 705, 719 (10th Cir. 1999), held that "[a] trial court need not ... expressly instruct a capital sentencing jury that unanimity is not required before each juror can consider a particular mitigating circumstance." *Accord Parker v. Norris*, 64 F.3d 1178, 1187 (8th Cir. 1995), *cert. denied*, 516 U.S. 1095 (1996) (that verdict form "failed to inform jurors that they could consider non-unanimous mitigating circumstances" did not violate *Mills*). *Compare* respondent's brief at 15 (arguing that *Mills* error arose because instructions "do not even hint" that a mitigation finding "need not be" unanimous); *Abu-Jamal v. Horn*, 520 F.3d at 303, App. 81 (concluding that the instructions did not "distinguish between mitigating and aggravating

circumstances in their application of the unanimity requirement").

Thus, the circuit court effectively requires jurors to be told that unanimity is *not* required in order to avoid the "risk of confusion." Because *Mills* did not so rule, this is a clear violation of the AEDPA deference standard.[4]

This is more than a mere circuit split. The above federal appellate decisions are *objective proof of the reasonableness of the state court's decision.* They were ignored by the circuit court (just as they are now ignored by respondent), even though the AEDPA standard precludes disturbing the state judgment unless it is objectively *unreasonable.* The

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[4] Consistent with its view that *Mills* concerned jurors' implicit understanding of instructions rather than what the instructions actually say, the circuit court justified this "anti-*Mills* instruction" requirement by citing 486 U.S. at 378-79 (Third Circuit opinion, 520 F.3d at 303, App. 81). But the discussion cited concerned the plausibility of Maryland's proposed saving construction, that jurors might have believed unanimity was required to find *or reject* mitigating circumstances. *Mills* did not hold that an instruction *denying* that unanimity is needed to find mitigation is necessary to avoid constitutional error. Or at least, it is reasonable for a state court to so conclude, because federal appellate courts have consistently done so. *E.g., Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993), *cert. denied*, 471 U.S. 1120 (1994) (*Mills* not violated because instruction did not "state that jurors must 'agree unanimously' on the existence of a mitigating factor").

Congressional intent in § 2254 was to restrict federal habeas relief to aberrant state decisions. Here, the circuit court decision is the aberration.

5. Why this case is important.

Respondent argues that this case is unimportant because *Mills* is unlikely to arise in many Third Circuit cases (respondent's brief, 33 et. seq.). He thus pretends that this case is only about *Mills*, but it is not. This case is about AEDPA deference.

The grant of certiorari in *Smith v. Spisak* establishes that the deference question in these cases is important.

Indeed, this Court's jurisprudence (*see* 6-7 & n.2, *supra*) clearly identifies, *as a national problem,* the inability or unwillingness of circuit courts to grasp that a collateral attack on a state criminal judgment in federal habeas is not an appeal from state courts to federal courts. Circuit courts do not yet understand that, if the case is close, *the habeas claim must fail.* Conversely, a successful claim must be relatively straightforward, because the controlling rule must be *clearly established* and the contrary result *unreasonable.*

Here, respondent produces a 36-page brief in support of the circuit court's own lengthy explanation

of what supposedly was *the only reasonable outcome*. How could it be so difficult to explain the obvious?

This Court has not yet afforded guidance to the Third Circuit with respect to the deference standard. The opportunity arose in *Beard v. Banks*, *supra*, but that case was decided on other grounds.[5] The factual and legal circumstances of these deference cases vary: this case concerns a *Mills* claim, while *Carey v. Musladin*, *supra*, for example, concerned jurors wearing buttons with pictures of the murder victim. It is the AEDPA deference question that matters.

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[5] The other Third Circuit case in which deference was in issue was *Rompilla v. Beard*, 545 U.S. 374 (2005), but that case may have had the unfortunate effect of *reducing* the apparent import of the standard in this circuit. 545 U.S. at 404-405 (Kennedy, J., with the Chief Justice, Scalia, J., and Thomas, J., dissenting) (concluding that reversal was not only inconsistent with the deference standard but sent the wrong signal to the circuit court).

Conclusion

For the reasons stet forth above, the Commonwealth respectfully requests this Court to grant its petition for writ of certiorari.

Respectfully submitted:

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